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In The

Supreme Court of the United States

October Term, 1997

JUAN GARCIA-ABREGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The pervasive use of non-reciprocal devices such as granting immunity, § 5K1.1 and Rule 35 reductions in sentence, unilateral payment of large sums of money, immigration permits and withholding serious charges from prosecution in order to recruit witnesses and obtain favorable testimony for the prosecution, so distorted the balance of the adversary process as to render these proceedings fundamentally unfair.

The Government's violation of the federal bribery statute, in offering the unilateral payment of large sums of money and substantially reduced sentences for favorable testimony, warrants exclusion of such testimony at trial.

The Trial Court's refusal to give a comprehensive jury instruction with respect to the non-reciprocal mechanisms utilized by the prosecution to "purchase" favorable testimony was error and deprived Appellant of a fair trial.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above proceeding on May 6, 1998, in *United States v. Garcia-Abrego*, 141 F.3d 142 (5th Cir. 1998). *See* Appendix at page 1a.

REFERENCE TO OPINION IN THE CASE

The judgment and opinion of the Fifth Circuit Court of Appeals is reported as *United States v. Garcia-Abrego*, 141 F.3d 142 (5th Cir. 1998), at page 1a of the Appendix hereto.

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. section 1254.[1]

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[1] "As long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the Supreme Court has jurisdiction to take the case whatever its status in the lower court." ROBERT L. STERN et al., SUPREME COURT PRACTICE 40 (7th ed. 1993) (relying on *The Conqueror*, 166 U.S. 110, 113-14 (1897)). *See also* MICHAEL L. TIGAR, FEDERAL APPEALS JURISDICATION AND PRACTICE 417 (2d ed. 1993) (stating "it is not necessary to file either the petition [for rehearing] under Rule 40 or the suggestion [for rehearing en banc] under Rule 35 to seek review in the Supreme Court."). *Cf. Severs v. Anderson*, 326 U.S. 219, 66 S. Ct. 72, 90 L.Ed. 26 (1945).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This petition seeks review of the Fifth Circuit's opinion affirming the conviction and sentence of this Petitioner. The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 and the Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 which authorizes appeals from the final order of a district court.

STATEMENT OF THE FACTS

At Petitioner's trial on drug and related charges, the Government paid its witnesses virtually hundreds of thousands of dollars, granted immunity from prosecution to individuals facing life sentences, filed § 5K1.1 and Rule 35 motions to reduce life sentences to as little as 3 years,

and provided immigration and work permits, all to witnesses willing to testify favorably for the prosecution.

For example, prosecution witness Horatio Vega received over $350,000.00, the FBI applied for a reward on his behalf, and the Government did not prosecute him for his criminal activity, in exchange for his "cooperation" and favorable testimony. 7R189-208. The Government reduced Francisco Perez's life sentence to 5 years, and he received $80,000 per year [some $187,000 by trial date] to continue for an unspecified period of time. 12R196-207, 13R35-8. Prosecution witness Francisco Segura received $125,000 in cash and a § 5K1.1 reduction of a potential life sentence to 42 months for his favorable testimony. 8R266-7, 300-302. Victor Garcia claimed he received a "personal loan" of $33,000 from an FBI agent and a "green card" permitting him "work authorization" from the Immigration service. 11R37-51, 70; 110-118. William Hoffman received a § 5K1.1 sentence reduction from life to 12 years, 3R159-161, and his wife Carmen Hoffman received a reduction to 3 years. 5R9-10, 52-54. Prosecution witness Jaime Rivas Gonzalez had his sentence reduced from life imprisonment to 10 years. Carlos Resendez received "$1,700 per month" (to continue for an unspecified period of time), was provided an "immigration permit," will not be prosecuted in the United States, and is a candidate for a $2,000,000 reward for his assistance, cooperation, and favorable testimony for the prosecution. 10R90-103. The Government promised prosecution witness Ricardo Garza an unspecified "sentence reduction" of his life sentence on a Rule 35 Motion for telling "the truth and nothing but the truth." 2R173-77. Carlos Rodriguez had his multiple 20 and 22-year sentences cut in half, 9R43-4, 142-176, testifying that

the "only people" empowered to seek such a reduction in exchange for his testimony were "the lawyers who are hired for the Government, the same people who file the papers that allow sentences to be reduced." 9R176.

Yet, the Trial Court refused to give an instruction, Dct. 348, RE12 pp. 1-3, informing the jury of the purely discretionary and non-reciprocal advantage these various inducements provide in obtaining favorable testimony exclusively for the prosecution side of the case. 14R131, 132, L. 9-15.

Purchasing the testimony of favorable witnesses with large sums of money and substantially reduced sentences would appear to be prohibited by ethical[2] and statutory[3] constraints. However, such "purchased" testimony has been tolerated where it was paid for by the prosecution. *See United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (*en banc)* (rejecting a *per se* "rule of exclusion"). Accordingly, the Fifth Circuit upheld Juan Garcia Abrego's conviction, finding that "[n]o practice is more ingrained in our criminal justice system" than the prosecution's exclusive authority to compensate favorable testimony with the promise of financial gain and reduced sentences. *United States v. Garcia-Abrego*, 141 F.3d 142, 151-54 (5th Cir. 1998) (Opinion at Appendix 1a).

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[2] *See* ABA Model Rules of Professional Conduct, Section 3.4(b).

[3] *See* 18 U.S.C. § 201(c)(2).

REASONS FOR GRANTING THE WRIT

1. **For the Government to have the exclusive right to purchase the testimony of each of its witnesses with large sums of money and substantial sentence reductions under § 5K1.1 and Rule 35, so distorted the adversary system's balance as to render these proceedings fundamentally unfair. The survival of a fair and just criminal process constitutes an important federal question and provides a compelling reason for this court to review the non-reciprocal ability of the Government to pay its fact witnesses with money and valued sentencing alternatives.**

During Petitioner's trial, the Government's extensive use of non-reciprocal devices designed to entice and compel favorable testimony for the prosecution created a lopsided proceeding where the prosecution was enfranchised to purchase favorable testimony through means which would have subjected its opponent to criminal prosecution.

At trial, the Government paid favorable witnesses hundreds of thousands of dollars, granted immunity from prosecution to individuals facing life sentences, filed § 5K1.1 and Rule 35 motions to reduce life sentences to as little as 3 years, and provided immigration and work permits, all to witnesses willing to testify against Petitioner. *See* 8R125, 130.

Institutionalizing such a panoply of procedures which provide a non-reciprocal advantage in obtaining favorable testimony exclusively for one adversary over the other cuts to the very quick of our delicately balanced adversary system.

"PURCHASING" TESTIMONY HAS BEEN PROSECUTOR'S EXCLUSIVE DOMAIN

It is not just that defense counsel were prevented by ethical constraints and criminal proscription from "purchasing" testimony favorable to Petitioner, but the fact that inmates serving lengthy sentences in institutions across the nation knew full well their "ticket out" lay with Mr. Abrego's prosecutors, that their "truth" was a valuable commodity only if it satisfied the prosecution side of this dispute.

Section 5K1.1 of the Federal Sentencing Guidelines provides prosecutors an exclusive vehicle to seek sentences below the applicable guideline sentence for witnesses who provide "substantial assistance" in the prosecution of others. Title 18 U.S.C. § 3553(e), grants similar power to prosecutors with respect to seeking sentences below the statutory "minimum mandatory" sentence. *See Wade v. U.S.*, 504 U.S. 181, 182 (1992) ["although a showing of assistance" to the prosecution is a necessary condition to a motion for "downward departure" both under § 5K1.1 and § 3553(e), the prosecutor's unfettered discretion whether to move for same is not reviewable except for "constitutional deprivations"]. Recent amendments to Rule 35 of the Federal Rules of Criminal Procedure grant federal prosecutors the exclusive authority to seek reductions in sentence[4] based upon a previously sentenced individual's assistance in prosecuting others. Title 18 U.S.C. § 6002 provides prosecutors with the exclusive discretionary authority to seek use immunity

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[4] Prior to the 1987 Sentencing Reform Act amendments to Rule 35, F.R.Cr.P., the rule permitted the defendant, as well as the prosecution, to request a reduction in sentence.

for witnesses from whom it seeks to compel testimony. *See U.S. v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) [holding that such non-reciprocal authority is subject to constitutional limitation]. *See also* discussion hereafter.

While paying large sums of money to witnesses in exchange for their favorable testimony would appear to be prohibited by ethical[5] and statutory[6] constraints, such "purchased" testimony has been tolerated in the past where it was paid for by the prosecution, *see U.S. v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987), *en banc* [rejecting a *per se* "rule of exclusion"] and was again given judicial approval by the Court below. *United States v. Garcia-Abrego*, 141 F.3d 142, 151 (5th Cir. 1998) [Appendix 1a-88a].

To sanction a reward system for the "purchase" of testimony *only* when it provides assistance to the prosecution side of the criminal adversary system so substantially distorts the trial process as to deny the accused any semblance of a fair trial.

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *Olmstead v. U.S.*, 277 U.S. 484, 574-75 (1928) (Brandeis, J., dissenting).

Whatever may be said of the long-standing judicial acceptance of "purchased" prosecutorial testimony, it is the non-reciprocal nature of such institutionalized inducements which are here called into question.

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[5] *See* ABA Model Rules of Professional Conduct, Section 3.4(b).

[6] *See* 18 U.S.C. § 201(c)(2).

Over a quarter century ago, addressing the non-reciprocal nature of Oregon's criminal discovery procedures, this Court noted that "the Due Process clause . . . does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Justice Marshall, speaking for the Court, went on to note that:

> "This Court has therefore been particularly suspicious of . . . trial rules which provide non-reciprocal benefits to the [prosecution] when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Wardius v. Oregon*, 412 U.S. 470, 474 n.6 (1973).

This concern for the "balance of forces between the accused and his accuser" is nowhere more paramount than in obtaining witnesses' testimony for the actual trial of a criminal case.

PAYING WITNESSES IS PROHIBITED IN *CIVIL* CASES

Courts have been quick to condemn the payment of money or other rewards to witnesses for their testimony in civil cases. *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994); *In re Robinson*, 151 A.D. 589, 600 (1912), *affirmed*, 209 N.Y. 354 (1913); *In re Klein*, 372 N.E.2d 376, 379 (1977). *See also The Florida Bar v. Jackson*, 490 So.2d 935, 936 (Fla. 1986) [attorney suspended for 18 months]; *Wagner v. Lehman Bros. Kuhn Loeb Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986) [attorney disqualified for promising to remit a percentage of potential recovery in a case to induce witness to tell the truth]. There is no reason why the rules should be different with respect to ensuring the integrity of a criminal trial where someone's

life or liberty is at stake, than in a civil action where all that is at risk is their property.

Basing its decision upon Florida ethical rules (which are almost identical to the provisions of § 3.4(b) of the American Bar Association's Model Rules of Professional Conduct), the United States District Court for the Southern District of Florida held in *Golden Door Jewelry Creations, Inc. v. Lloyds Underwiters Non-Marine Association*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994) that:

> "[P]aying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not . . . violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so."

The Court there found that "the exclusion of all evidence tainted" by such purchased testimony was the proper and appropriate remedy.

The fact that any agreement with these witnesses for the purchase of their testimony may have been conditioned upon their telling the "truth" is of little import, since such payments subvert and undermine the integrity and appearance of fairness in our judicial system. *See Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994) [reiterating that "payment of a sum of money to a witness *to 'tell the truth' is as subversive of the proper administration of justice as to pay him to testify to what is not true*"] (emphasis in original). *See also Wagner v. Lehman Brothers Kuhn Loeb Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986) [danger of promising a reward, even for "truthful" testimony is that the witness "is induced by the promise of

potential payment to give testimony he otherwise might not have given. . . . [the effect on the integrity of the judicial system is the same".] While it may not necessarily be criminal,[7]

> "[o]ffering to pay money or other rewards to witnesses in return for their testimony, *be it truthful or not* . . . violates the integrity of the justice system and undermines the proper administration of justice." (emphasis supplied) *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. at 1526.[8]

Furthermore, Government attorneys who make such agreements, and who condition same on the witness' testimony being "truthful", do not themselves have any personal knowledge what the truth is; that is the province of the fact-finder. *See Hoffa v. U.S.*, 385 U.S. 293 (1966) and *U.S. v. Cervantes-Pacheco*, 826 F.2d 310, 314 (5th Cir. 1987)

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[7] Title 18 U.S.C. § 201(c)(2) makes it a crime to offer anything of value to a witness for their testimony, without distinction "between truthful or untruthful testimony". *See Golden Door Jewelry v. Lloyds*, 865 F. Supp. at 1523. However, the Court there held it was bound by dicta in *U.S. v. Moody*, 977 F.2d 1425 (11th Cir. 1993) where the Eleventh Circuit held that § 201(c)(2) proscribes *only* "a bribe for *false* testimony." (emphasis supplied) *U.S. v. Moody*, 977 F.2d at 1424-5.

[8] *See also In re Robinson*, 151 A.D. 589, 600 (1912), *affirmed*, 209 N.Y. 354 (1913) and *In re Klein*, 372 N.E. 2d 376 (1977) where an Illinois court stated that:

> "We will not tolerate payments of any sum of money by an attorney to witnesses for the opposition to secure or influence testimony, whether it be for the purpose of securing truthful testimony or otherwise." *In re Klein*, 372 N.E.2d 376, 379 (1977) [attorney suspended for 18 months].

en banc ["the credibility of witnesses is to be determined by the jury"]. Instead, they, like their defense counterpart, know their theory of the case. That is as it should be in an adversarial system. It is the job of attorneys to advance their client's cause. It is not that Government attorneys' motives are less than honorable, it is simply that prosecutors are no more appropriate arbiters of the "truth" than defense counsel.

It would, however, be the height of naivete to suppose that the criminals whose testimony is being paid for would have any compunction about manipulating their position, or to suppose that such individuals would not attempt to tailor their recollection to suit what they must assume these prosecutors want to hear.

The fact that the agreement for witness testimony here was "contingent on the condition that the testimony had to be helpful" to the prosecution "makes even more pronounced the subversive and egregious nature" of such "purchase" agreements with witnesses for one side in disputed litigation. *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994). This is particularly true, where such conduct would be prohibited, even condemned as criminal, if it were engaged in by the other side.

Neither the Rules of Evidence nor the statutes criminalizing the compensation of witnesses for their favorable testimony make any distinction between the criminal and civil context and one would be hard pressed to argue

that integrity is more necessary or valuable in civil litigation than its criminal justice counterpart.[9]

IF SUBSTANTIAL REWARDS FOR FAVORABLE TESTIMONY ARE TO BE TOLERATED, SUCH INDUCEMENTS SHOULD BE A TWO-WAY STREET

Likewise, courts have not hesitated to scrutinize a prosecutor's interference with a defendant's right to obtain favorable testimony. *U.S. v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) ["Government interference with a defense witness' free and unhampered choice to testify violates due process"]; *U.S. v. Morrison*, 535 F.2d 225, 228 (3d Cir. 1976) [prosecutor's warning to essential defense witness of potential prosecution if the witness testified "violated the defendant's right to compulsory process and hence the defendant's right to due process."]. *See also U.S. v. Lord*, 711 F.2d 887 (9th Cir. 1983).

In order to insure that the Federal Rules of Evidence provide a two-way avenue of admissibility, lower federal courts have judicially mandated the same rigorous corroboration requirements which the Federal Rules expressly require for "statements-against-interest" offered by the defense to "exculpate" an accused, *see* Rule 804(b)(3) F.R.Ev., upon the prosecution's use of such statements to "inculpate" an accused. *U.S. v. Alvarez*, 584 F.2d 694, 700-701 (5th Cir. 1978) [reversing and rendering for insufficient evidence]; *U.S. v. Riley*, 657 F.2d 1377, 1382-3 (8th Cir. 1981); *U.S. v. Taggart*, 944 F.2d 837, 840

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[9] In fact, as this Court noted in a civil case, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), "the Constitution guarantees a criminal defendant certain fair trial rights not enjoyed by the prosecution."

(11th Cir. 1991). *And see Williamson v. U.S.*, 512 U.S. 594 (1994) [where this Court noted, but did not decide this issue].

Court's have recognized that "where two eyewitnesses tell conflicting stories, and only the witness testifying for the government is granted immunity, the defendant would be denied 'any semblance of a fair trial.' *U.S. v. Brutzman*, 731 F.2d [1449, 1452 (9th Cir. 1984)]." *U.S. v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991).[10] *See also U.S. v. Lord*, 711 F.2d 887, 889-92 (9th Cir. 1988) ["the key issue in the analysis of defense use immunity is whether the defendant was denied a fair trial"]; *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *U.S. v. Alessio*, 528 F.2d 1079, 1081 (9th Cir. 1976) ["a defendant might be denied due process if the government uses its authority

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[10] While cases from the Fifth Circuit have "strongly suggested, without deciding, that courts lack such power", *U.S. v. Thevis*, 665 F.2d 616, 639 n.25 (5th Cir. 1982), the Court has repeatedly recognized that:

> "The Fifth Circuit has not explicitly determined whether due process may require a court to grant a defense witness use immunity." *U.S. v. Thevis*, 665 F.2d at 639.

See also U.S. v. Chagra, 669 F.2d 241, 258-9 (5th Cir. 1982) [recognizing that "(a)t the same time, we have also suggested, without deciding, that the federal constitution may in some extraordinary circumstances require . . . defense witness immunity . . . to protect a defendant's right to a fair trial."], and *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983) [rejecting such authority absent "governmental abuse"]. However, a process is no less unfair simply because the mechanism creating a one-sided bias comes from a combination of well-intentioned, yet decidedly unfair institutionalized practices than the malice or bad faith of a particular prosecutor.

to seek immunity for its own witnesses but declines to do so on behalf of the defendant"].

However, the issue here presented is not whether a defendant must be accorded immunity for defense witnesses, but whether and at what point the prosecution's advantage in obtaining favorable testimony so substantially distorts the delicately balanced adversary process as to render such proceedings unfair.

This Court has noted in other contexts that our courts are "not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' " *Florida v. Bostick*, 501 U.S. 429, 439 (1991). Over a decade ago, Judge Rubin from the Fifth Circuit noted that:

> "Even our system of civil justice rests on the adversary process. In a criminal trial that process is paramount. . . . Even in the war against crime, due process forbids terrorism." *U.S. v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986), Rubin, J., concurring, modified on other grounds, 809 F.2d 249 (5th Cir. 1987).

How can we call an adversary process fair when the "truth" may be purchased *only* by one side of a disputed controversy? The rules regarding "purchased testimony" should be a two-way street. They should not favor one side of the adversary process over the other.

A decade ago, in *U.S. v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987), the Fifth Circuit, sitting *en banc*, overruled a long-standing *per se* rule in that Circuit that an informant paid a contingent fee is not a competent witness. *See Williamson v. U.S.*, 311 F.2d 441 (5th Cir. 1962). The Court did so despite a recognition that "it is difficult to imagine a greater motivation to lie", on the basis that "[n]o practice is more ingrained in our criminal justice

system" than the practice of promising an accessory witness lucre[11] or liberty[12] in exchange for their favorable testimony.

However, the fact that unconstitutional practices have been long tolerated has not caused the federal judiciary to shy away from reconsidering such issues when they are squarely presented in new light. *See Brown v. Board of Education*, 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973); *Clay v. U.S.*, 403 U.S. 698 (1971); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *U.S. v. Lopez*, 514 U.S. 549 (1995); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2580 (1996). Moreover, this issue has never been squarely present for this Honorable Court's resolution.

Petitioner does not here seek to resurrect any *per se* rule of exclusion. Rather, Abrego questions whether "due process", fundamental fairness and an accused's meaningful right to some parity in the compulsory process of

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[11] *See U.S. v. Rey*, 811 F.2d 1483, 1456-7 (11th Cir. 1987) [rejecting a *per se* rule excluding the testimony of witnesses paid a contingent fee, however, recognizing that "(i)n rare cases, use of a contingently motivated informer might, conceivably, be so outrageous as to violate due process"].

[12] Rejecting a *per se* rule of exclusion, courts have placed their stamp of permiture upon plea agreements providing an accomplice-witness a lenient sentence contingent upon the extent of their cooperation. *U.S. v. Kimble*, 719 F.2d 1253 (5th Cir. 1983); *U.S. v. Dailey*, 759 F.2d 192, 196-200 (1st Cir. 1985); *U.S. v. Grimes*, 438 F.2d 391, 395-6 (6th Cir. 1984); *U.S. v. Wilson*, 904 F.2d 656, 658-660 (11th Cir. 1990) [citing *Cervantes-Pacheco* with approval, and noting that the Revenue Code's "statutory reward" must " . . . be put in context with other, long-established means by which the Government obtains favorable testimony"].

witnesses will tolerate a system that permits only one side of the adversary process to utilize such non-reciprocal incentives to entice witnesses and "purchase" favorable testimony.

Addressing concerns regarding this very issue, Judge Brown wrote separately to the Fifth Circuit's *en banc* opinion in *Cervantes-Pacheco*:

> "The pressures which this uncontrollable appetite generates require that the rights of an accused be carefully protected lest an innocent person become the victim of the 'contingent' informer [ ] . . . This may well require inquiry into the methods used, the circumstances under which an [ ] informer is utilized, the nature of the instructions given, the standards laid down to test the sufficiency of his performance upon which his reward is to be based, or the like." *Williamson v. United States*, 311 F.2d 441, 445 (5th Cir. 1962) (Brown, J., concurring specially) (emphasizing the fact that special jury instructions might be required).

Judge Rubin, concurring in *Cervantes-Pacheco*, reluctantly sanctioned the use of such purchased testimony by the Government suggesting, almost tongue-in-cheek, that in order to afford "equal opportunity," the citizen accused must be permitted to engage in "this perversion of the trial process," noting that he was "troubled by the results of [this] decision." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (Rubin, J., concurring).

> "[T]he government may . . . offer witnesses plea bargains for either a reduced sentence or immunity in exchange for their testimony and thus provide an incentive greater even than a contingent fee. *If the government may do so, the defendant*

> *presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal. While this balances opportunity equally, it patently permits perversion of the trial process, and I am therefore troubled by the possible results of our decision."* (emphasis supplied) *U.S. v. Cervantes-Pacheco*, 826 F.2d at 316 (Rubin, J., concurring) in result.

Numerous other courts have criticized the unfettered prosecutorial discretion involved in this practice, noting its susceptibility to abuse. *See U.S. v. Gonzalez-Bello*, ___ F. Supp. ___, 1998 WL 352941 (E.D.N.Y. June 26, 1998) (guidelines obviously alter the way the sentencing process works, effect on cooperating witness scenario is no exception); *U.S. v. Ming He*, 94 F.3d 782, 788 (2d Cir. 1996) (guidelines have altered sentencing process concerning cooperating witnesses significantly diminishing power of judges); *U.S. v. Correa*, 995 F.2d 686, 687 (7th Cir. 1993) (many courts concerned regarding government's inconsistent departure policy that is often arbitrary and amounts to "simple prosecutorial expediency"); *U.S. v. Thomas*, 930 F.2d 526 (7th Cir. 1991) [same]; *U.S. v. Rexach*, 896 F.2d 710, 714 (2d Cir.), *cert. denied*, 498 U.S. 969, 111 S. Ct. 433, 112 L.Ed.2d 417 (1990) ("guidelines give the key to sentencing leniency . . . to the prosecutor, effecting a profound alteration . . . of sentencing authority").

> " . . . 'Substantial assistance to the government is [ ] an avenue of relief to the mandatory minimum sentences applicable to most drug traffickers. 18 U.S.C. section 3553(e). Rendering substantial assistance, however, is not enough. Both U.S. S.G. section 5K.1.1 and 18 U.S.C. section 3553(e) require a motion from the government. In the absence of a plea agreement, the government may decline to make such a motion

for any reason other than an unconstitutional one, such as race or religion. . . . Even when there is a cooperation agreement, the government invariably reserves to itself the right to determine whether the assistance is 'substantial,' and thus can refuse to make a motion as long as it does not choose that course 'invidiously or in bad faith.' . . . In the absence of a government motion, the sentencing Judge cannot sentence below the prescribed range (or mandatory minimum sentence) based on cooperation. Thus, the guidelines give the key to sentencing leniency on this ground to the prosecutor, effecting a profound alteration of the pre-guidelines allocation of sentencing authority . . . [and, therefore] [t]his regime has empowered prosecutors. . . . The second circuit has lamented that even though judges are 'particularly well-positioned' (as compared to prosecutors) 'to evaluate . . . moral worthiness, contrition and rehabilitation,' factors that are often critical in the sentencing of a cooperating defendant, the guidelines prohibit a downward departure based on those considerations unless the government authorizes one with a motion. . . . It finds this 'transfer of authority from judges to prosecutors especially troubling' and susceptible of abuse . . . Although reasonable people have reached conflicting assessments of the wisdom of empowering prosecutors in this way, no one disputes that this new regime has elevated the stakes for would-be cooperating witnesses during their proffer sessions with the government." *United States v. Gonzalez-Bello,*

1998 WL 352941 (E.D.N.Y. June 26, 1998) (internal citations and footnotes omitted).[13]

These problems have also been noted by legal commentators and the Federal Sentencing Commission itself. *See generally* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity In Current Federal Policy And Practice*, at 9-10 (on file with United States Sentencing Commission); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L.Rev. 569 (1998); Ralph V. Seep, *Validity and Construction of Provision of 18 USCA 3553(e) and U.S. Sentencing Guidelines 5K1.1, Providing That Sentencing Court Make Downward Departure from Sentencing Guidelines for Defendant's Substantial Cooperation With Prosecution*, 111 ALR Fed. 547 (1993); Michael S. Ross, *Cooperation With Federal Authorities; Operating On*

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[13] "Indeed, if Congress had asked federal prosecutors to devise a sentencing scheme that would place the maximum permissible pressure on the criminal defense to cooperate, they could hardly have done better than the sentencing guidelines." *See United States v. Gonzalez-Bello*, ___ F. Supp. ___, 1998 WL 352941 (E.D.N.Y. June 26, 1998). In *Gonzales-Bello*, the court stated, "[m]ore than 20 percent of all federal defendants now receive 'substantial assistance' motions. Many more cooperate; a recent study by the sentencing commission reveals that only 38.6 percent of all defendants to provide assistance to the government receive such motions, and that approximately two-thirds of all defendants provide some assistance to the government." *See United States v. Gonzalez-Bello*, ___ F. Supp. ___, 1998 WL 352941 (E.D.N.Y. June 26, 1998) (relying on Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gaging Equity In Current Federal Policy End Practice*, at 9-10 (on file with and published by the United States Sentencing Commission)).

The Outer Limits, 12 Sum.Crim.Just. 4, Summer 1997; Stanley J. Okula, *Third Party Cooperation: Proceed With Caution*, 12 Sum.Crim.Just. 5, Summer 1997.

In their opinion below, the Fifth Circuit equates this unequal benefit accorded the Government with its non-reciprocal ability to offer its witnesses court-ordered immunity under Title 18 U.S.C. section 6002. *United States v. Thevis*, 665 F.2d 515 (5th Cir. 1982), recognizing that where the government's use of its exclusive power to grant immunity to prosecution witnesses effects the fairness of the proceeding, the trial court might intervene and grant defense witness immunity; *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1992). The Fifth Circuit goes on to suggest that Petitioner did not identify the witnesses who would have offered testimony on his behalf were the defense empowered to compensate them. However, the defendant should not be faulted for not offering money or reduced sentences for truth that favors his side of the dispute, because to do so would clearly violate federal criminal statutes. The law never requires the doing of a useless, *see Magruder v. Union Bank of Georgetown*, 28 U.S. 87 (1830), much less, an illegal act.

The non-reciprocal nature of a "truth-seeking" process which institutionalizes rewarding the truth only when it assists one side of the adversary process raises serious concern about the fairness of such proceedings.

ISSUE OF FIRST IMPRESSION

This Court has never squarely dealt with the due process and equal protection implications of paid informer testimony. In *Hoffa*, "[t]he specific question

before [the Court], as framed by counsel for the petitioners, is this: whether evidence obtained by the government by means of deceptively placing a secret informer in the quarters and counsels of a defendant during one criminal trial so violates the defendant's fourth, fifth, and sixth amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge." *Hoffa v. U.S.*, 385 U.S. 293, 295, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966). Although *Hoffa v. U.S.*, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966) involved a due process claim and a paid informer, *Hoffa's* issue before this Court presented only the constitutionality of directing a Government informer to infiltrate a defendant's quarters and his relationship with his counsel during a criminal trial. There, the due process claim centered upon the use of an informer to gain access to the "defense camp" during a criminal trial. The issue presented herein is the ethics of permitting one side of the adversary process the exclusive right to offer compensation for favorable testimony.

Further, the type of incentives given to the witness in *Hoffa v. U.S.*, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966) differed qualitatively and quantitatively from those presented in the instant case. The current practices regarding paid informer testimony present a threat to constitutional liberty simply not present in *Hoffa v. U.S.*, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966). This issue should be reexamined in light of the drastic change in the law and practice concerning paid informant and accomplice testimony. The use of purchased testimony in federal criminal trials has exploded since the federal sentencing guidelines' effective date in 1987. In *Hoffa*, the witness' wife was paid three hundred dollars a month for

four months following his infiltration of the defense camp, and before the trial in which his testimony was used. In this case, the Government promised one witness the prospect of two million dollars for his favorable testimony.

Prior to the codification of the guidelines, rewards of lenience could be granted by a trial court on its own. Under the sentencing guidelines, before such a § 5K1.1 downward departure may be granted by the sentencing court, the prosecutor must first move for same. These two developments produce an incentive for witnesses to please today's prosecutors that is different in kind and quality than that in *Hoffa*. Today, telling the truth to the court is not enough. Without pleasing the prosecutor, no benefit will accrue to a government witness in a federal criminal trial. This practice has become so ingrained that today cases like Abrego's are routinely based upon little other than the bargained for testimony of accomplice witnesses. While the Constitution's guarantee of due process is constant, the practices of federal prosecutors are not. Former practice might have been adequately safeguarded by a simple instruction to treat purchased testimony with additional care. Under today's practice, due process demands reasonable limitations upon such testimony or, at the very least, a detailed instruction clearly pointing out its exclusive, non-reciprocal prosecutorial advantage.

2. The Government's violation of the federal bribery statute, in offering the unilateral payment of large sums of money and substantially reduced sentences for favorable testimony, warrants exclusion of such testimony at trial.

POTENTIAL CONFLICT WITH OTHER CIRCUITS

The Tenth Circuit Court of Appeals preliminarily issued, then withdrew,[14] an opinion which completely excludes such purchased prosecutorial testimony on the grounds that offering to reward a witness for his or her testimony violates the federal bribery statute [18 U.S.C. section 201(c)(2)], noting that:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *United States v. Singleton*, 1998 U.S. App. Lexis 14896 (10th Cir. July 1, 1998) (relying on *Olmsted v.*

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[14] The Tenth Circuit's *en banc* order, vacating the panel opinion, requests supplemental briefs addressing "whether any opinion reversing the district court would have prospective or retrospective application." *U.S. v. Singleton*, 1998 U.S. App. Lexis 15451 (10th Cir. July 10, 1998), *en banc*.

United States, 277 U.S. 438, 485, 72 L.Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting)).

There exists a potential split among the Circuits with regard to this widely utilized yet unfair practice. This issue, which has recently come under considerable scrutiny by legal and lay journals alike [*see infra* and Appendix 89a-143a], is ripe for determination by this Court.

3. The Trial Court's refusal to give a comprehensive jury instruction with respect to the non-reciprocal mechanisms utilized by the prosecution to "purchase" favorable testimony was error and deprived Appellant of a fair trial.

The Court below found that a charge informing the jurors that they should consider purchased accomplice testimony with greater caution than other testimony was sufficient to safeguard a criminal defendant.[15] In *Hoffa v. U.S.*, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966), this Court stated that special issues regarding informant testimony require special instructions concerning such testimony and, importantly, require a jury instruction to be both "specific" and "general". *Hoffa v. U.S.*, 385 U.S. 293, 312 (1966). Whenever a special, unique, or suspect issue

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[15] While the Fifth Circuit noted that Petitioner's requested instruction was not a technically inaccurate statement of the law, it stated same had the potential to confuse the jury because it focused on the role of the prosecutor. *United States v. Garcia-Abrego*, 141 F.3d 142, 153 n.2 (5th Cir. 1998). However, Abrego's requested instruction clearly states in the first sentence that the prosecutor must file a motion "with the sentencing judge asking the judge to reduce the sentence of the witness." *United States v. Abrego*, 141 F.3d 142, 153 (5th Cir. 1998).

regarding informant testimony has arisen, this Court has recognized the need for a special instruction addressing that issue.

In cases where the government's fact witnesses are all receiving benefits in exchange for their testimony,[16] the Jury should be instructed regarding the non-reciprocal ability of the government to pay money and offer substantially reduced sentences to its witnesses. The fact that a great proportion of government witnesses have received benefits that only the government can provide and which the government decides to grant in its sole discretion goes to whether the strength of the evidence meets the legal standard of "beyond a reasonable doubt."

In rejecting a *per se* "rule of exclusion" with respect to prosecution witnesses receiving a "contingent fee" for their favorable testimony, the *en banc* Fifth Circuit emphasized in *Cervantes-Pacheco* that it did so on the basis "that the credibility of the compensated witness, like that of the witness promised a reduced sentence, is for a *properly instructed* jury to decide." (emphasis added). *United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987) (*en banc*).

At the trial below, the Government paid favorable witnesses virtually hundreds of thousands of dollars, granted immunity from prosecution to individuals facing life sentences, filed § 5K1.1 and Rule 35 motions to reduce life sentences to as little as 3 years, and provided immigration and work permits – all to witnesses willing to utter the "magic words" of "Juan Garcia." Yet, the Trial

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[16] Here, all the fact witnesses concerning offense conduct were paid or given incentives.

Court refused Petitioner's repeated requests for a comprehensive jury instruction apprising the jury of the purely discretionary and non-reciprocal nature of the myriad of inducements available exclusively to the prosecution for the "purchase" of testimony favorable to their side of the dispute.

Prior to trial, Petitioner filed a requested jury instruction explaining in some detail the Federal Sentencing Guidelines, "minimum mandatory sentencing" and the fact that the ability to request a reduction of sentence under § 5K1.1 or Rule 35 was "within the sole discretion of the prosecutor":

> "Under the current federal sentencing law, which became effective on November 1, 1987, individuals convicted of crimes occurring after that date are sentenced under the Sentencing Guidelines . . . [u]sing a numerical formula [to] determine the appropriate sentencing range. . . . In addition, individuals who are convicted of drug offenses in the federal system face long mandatory minimum terms of imprisonment. An individual sentenced pursuant to the Guidelines must serve at least 85% of his sentence without any possibility of parole . . .
>
> *Under the current law, the only way that a cooperating witness can receive a reduction of his sentence below the numerically determined guideline range or the mandatory minimum is if a prosecutor files a motion with the sentencing judge asking the judge to reduce the sentence of the witness. You have heard the terms '5K1.1' and 'Rule 35' during this case. Those are legal terms that refer to motions filed by the prosecutor to reduce the sentence of a witness based on the witness' cooperation and 'substantial assistance' to the government in the . . . prosecution of another individual. . . . The decision to file a*

> *'5K1.1 motion' or 'Rule 35 motion' is within the sole discretion of the prosecutor.* Simply because a witness testifies truthfully does not mean that the prosecutor will file a '5K1.1 motion' or 'Rule 35 motion' on the witness' behalf.
>
> Sentencing judges are powerless to reduce the sentence of a cooperating witness below the mandatory minimum or applicable guideline unless the prosecutor files the '5K1.1 motion' or 'Rule 35 motion' on behalf of the witness. *Moreover, the defense lawyers in this case have no power to file a '5K1.1 motion' or 'Rule 35 motion' on behalf of a witness who testifies, and therefore, are powerless to help a cooperating witness receive a reduced sentence. . . . You should consider that such a witness may be motivated to please the prosecutor, since only the prosecutor, not the defense lawyer, can help that witness obtain a reduction of his sentence."* (emphasis added) *See* DEFENDANT'S PROPOSED JURY INSTRUCTIONS, Dct. 262. at 34-36.

Again, at the trial's conclusion, the Petitioner requested an identical instruction, which would have informed the jury of the non-reciprocal nature of the many inducements for favorable testimony enjoyed exclusively by the prosecution's side of the case. *See* DEFENDANT'S REQUESTED INSTRUCTION NO. 1, Dct. 348, RE 12, at 1-3. The Trial Court, however, refused Petitioner's requested jury instruction, 14R132, l.9-15, and Petitioner's counsel timely objected, 14R131.

Given the pervasive nature of these non-reciprocal inducements to "purchase" prosecution testimony in this case, the Trial Court's standard cautionary instruction that testimony of an "accomplice" or an "informer for pay or for immunity from punishment" should be "weighed by the jury with greater care and caution" *See* Dct. 369, RE 11, was of little avail, particularly in light of

the Court's additional instruction that "[s]uch plea bargaining . . . has been approved as lawful and proper, and is expressly provided for in the rules of this court". *See* Dct. 369, RE 11. This placed the Trial Court's stamp of permiture upon such practices, while at the same time refusing to instruct the jury of their purely discretionary and non-reciprocal nature.

Moreover, permitting the prosecutor to elicit testimony, over timely and appropriate defense objection, that her motion to reduce a prosecution witness' sentence was "conditioned" upon that witness telling "the truth and nothing but the truth,"[17] 2R176, l.25-177, l.7, while refusing the defense a proposed jury instruction explaining the true nature of such inducements, only served to exacerbate the problem.

If we are to tolerate an adversary system where one side is permitted the exclusive luxury of "buying" witnesses' testimony under the guise that a jury is competent to "weigh the . . . inherent unreliability of 'purchased' testimony," *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987) (*en banc*), we should insist that the jury receive "proper instructions" with regard to the non-reciprocal, discretionary nature of same.

CONCLUSION

At trial, the Government paid favorable witnesses hundreds of thousands of dollars, granted immunity

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[17] The prosecution was also allowed, over timely objection, to ask a witness:

> "Q. Well, you have been asked if you are selling your testimony . . . Do you think a Judge in Brownsville or a Judge in New Jersey is going to buy lies?" 9R192.

from prosecution to individuals facing life sentences, filed § 5K1.1 and Rule 35 motions to reduce life sentences to as little as 3 years, and provided immigration permits to witnesses willing to testify for the prosecution.

Motions under § 5K1.1 of the Federal Sentencing Guidelines for "downward departures", Rule 35, F.R.Cr.P. motions to reduce sentences, Title 18 U.S.C. § 6002 grants of immunity, and Immigration permits are all the exclusive domain of the prosecutor. Moreover, for defense counsel to offer even small sums of money or other rewards for "truthful" testimony favorable to an accused would subject them to ethical and even criminal prosecution. To sanction such a reward system for the "purchase" of testimony *only* when it provides assistance to the prosecution cuts to the very quick of the adversary system and denied Petitioner his Constitutionally protected right to "due process", "fundamental fairness", and any semblance of parity in the compulsory process of witnesses.

If this was an issue for the jury to decide, then Petitioner was entitled to a requested instruction informing the jury of the purely discretionary, non-reciprocal nature of these many inducements for favorable testimony enjoyed exclusively by the prosecution's side of the case. The Trial Court's additional instruction that "[s]uch plea bargaining has been approved as lawful and proper, and is expressly provided for in the rules of this court," coupled with allowing the prosecutor to elicit testimony over timely objection that her motion to reduce a prosecution witness' sentence was "conditioned" upon that witness "telling the truth and nothing but the truth", while at the same time refusing to instruct the jury of the true nature of such one-way, non-reciprocal incentives for recruiting witnesses and "purchasing" favorable

testimony, only exacerbated the problem. The writ for certiorari should issue.

Respectfully submitted,

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JUAN GARCIA ABREGO, Defendant-Appellant.

No. 97-20130

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

141 F.3d 142

May 6, 1998, Decided

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee: Paula Camille Offenhauser, Assistant U. S. Attorney, Kathlyn Giannaula Snyder, US Attorney's Office, Houston, TX.

For JUAN GARCIA ABREGO, Defendant-Appellant: Cynthia Eva Hujar Orr, Gerald H Goldstein, Goldstein, Goldstein & Hilley, San Antonio, TX.

JUDGES: Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

OPINION BY: KING

OPINION:

KING, Circuit Judge:

Defendant-appellant Juan Garcia Abrego appeals his conviction and sentence for ten counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), five counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), three counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), one count of conspiracy to launder money in violation of 18 U.S.C. § 1956(h), and one count

of conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848. We affirm.

I. FACTUAL BACKGROUND

For approximately two decades, Juan Garcia Abrego was the hub of a narcotics smuggling syndicate of staggering dimension. Headquartered in Matamoros, Mexico, Garcia Abrego's organization was responsible for smuggling tremendous quantities of cocaine and marijuana into the United States from the mid-1970s to the mid-1990s.

Garcia Abrego began trafficking large quantities of marijuana in the mid-1970s. In 1976, Carlos Resendez, a long time friend of Garcia Abrego, delivered approximately 300 kilograms of marijuana to him. Francisco "Paco" Perez also began working for Garcia Abrego in the drug trafficking trade around 1980. At Garcia Abrego's direction, Perez unloaded marijuana flown in on a small plane by Oscar "El Profe" Lopez Olivares, stored it in a warehouse on Garcia Abrego's ranch in Soliceno, Mexico, and smuggled it across the border into the United States in inner tubes.

In the early 1980s, Garcia Abrego expanded his operation. According to some members of his organization, in 1985, Garcia Abrego ordered the murder of Casimiro "Cacho" Espinoza, another drug trafficker in Mexico, in order to eliminate competition. Thereafter, Luis Medrano, who had previously worked for Espinoza, went to work for Garcia Abrego.

In 1986, Garcia Abrego began trafficking cocaine because marijuana was a seasonal business. Luis Medrano and Oscar Malherbe worked as managers and supervisors one step below Garcia Abrego in the chain of command in his organization. Medrano and Malherbe enlisted the services of a number of other individuals, including Jaime Rivas Gonzales, Tony Ortiz, Tomas "Gringo" Sanchez, and Juan Ibarra, to transport cocaine into the United States and the rich proceeds from its sale back into Mexico. These individuals in turn utilized the services of numerous other individuals to package and deliver the cocaine and to collect and deliver the money.

Garcia Abrego used money from his drug operation to purchase large ranches in Soto La Marina, an area south of Matamoros. Malherbe and Medrano arranged for loads of cocaine to be flown to these ranches, and from there, the cocaine was moved to Matamoros. The cocaine was smuggled across the border and stockpiled in the Brownsville, Texas area. From there, members of Garcia Abrego's organization arranged the shipment of the cocaine to Houston. From Houston, the drugs were distributed locally and nationally, principally to New York and Los Angeles. Garcia Abrego's organization utilized vehicles with hidden compartments to transport cocaine and proceeds from its sale inside the United States. Until 1990, the organization also utilized INS buses to smuggle narcotics into the United States.

Garcia Abrego's organization trafficked a huge amount of narcotics. Between 1989 and 1993, U.S. law enforcement officials seized over thirteen tons of the organization's cocaine, but this was but a fraction of the amount that the organization successfully smuggled into

the United States. Jaime Rivas Gonzales testified that he moved between thirty-three and forty tons of cocaine for the organization, and Carlos Rodriguez testified that he moved over fifty tons. Tony Ortiz testified that he moved 10,000 kilograms of cocaine for the organization.

Garcia Abrego's organization derived substantial profits from its drug trafficking activities. Members of the organization sold cocaine in Houston for between $17,000 and $23,000 per kilogram and in Los Angeles and New York for between $23,000 and $25,000 per kilogram. Tony Ortiz testified that he collected $60 to 70 million on behalf of the organization in New York and Houston and shipped it back to Matamoros.

In addition to trafficking narcotics, Garcia Abrego's business also included providing "protection" to other drug traffickers moving narcotics through the Matamoros area. In the mid-1980s, Carlos Resendez, who had begun working for Garcia Abrego full time, set up a meeting between Garcia Abrego and Fernando "El Aguacate" Martinez, another drug trafficker who sought permission from Garcia Abrego to move cocaine through the Matamoros area. Garcia Abrego agreed to allow him to do so in exchange for $200,000 for each airplane load brought through the area.

According to some members of his group, when Garcia Abrego got word that Martinez had landed planes without paying the $200,000 fee, he became angry and had his men capture a member of Martinez's organization and beat information out of him regarding the rival organization, including the number and weights of loads of cocaine that the organization transported. In hopes that

law enforcement authorities could eliminate his competition for him and save him the trouble of doing it himself, Garcia Abrego turned this information over to FBI Agent Claudio DeLaO, who was masquerading as a corrupt agent in an attempt to effect Garcia Abrego's arrest. Insofar as more direct efforts are concerned, DeLaO asked Garcia Abrego in a subsequent telephone conversation what had happened to the member of Martinez's group from whom he had acquired information. Garcia Abrego responded, "We left him at the Rio Bravo more or less," a comment which DeLaO took to mean that Garcia Abrego had killed him. Garcia Abrego also stated that another member of Martinez's group from whom he had acquired information "already went to heaven." Garcia Abrego then indicated that he had gathered his men to take care of Martinez personally, but that, before they could do so, Mexican federal police arrested Martinez. Thereafter, Garcia Abrego began demanding forty to fifty percent of Colombian traffickers' loads in exchange for the privilege of moving narcotics through the Matamoros area.

Carlos Rodriguez, Sergio "Checo" Gomez, and Jesus "Chuy" Espinoza also paid Garcia Abrego's organization for the privilege of trafficking cocaine through Matamoros. Rodriguez and his cohorts received their cocaine from the Medellin Cartel. However, Medrano and Malherbe subsequently informed Rodriguez that he and his comrades were being absorbed into Garcia Abrego's organization and that they could no longer purchase cocaine from the Medellin Cartel because their organization worked exclusively with the Cali Cartel.

The hierarchy of Garcia Abrego's organization was firmly established. If a member of the group overstepped

his authority, the consequences were dire. In 1991, Tomas "Gringo" Sanchez, a principal player in the New York segment of Garcia Abrego's distribution network, ordered the killing of a Colombian drug trafficker in a Matamoros jail without authorization from Garcia Abrego. As a result of the killing, a riot broke out in the jail, killing two members of Garcia Abrego's organization. Garcia Abrego was upset by Sanchez's acting without authority because of the intense media attention that the riot caused. He had also concluded that Sanchez had gotten out of hand and lost a great deal of money for his organization. Thereafter, Luis Medrano ordered Sanchez killed.

Garcia Abrego protected his business from interference from law enforcement by paying large bribes to Mexican law enforcement officials. Specifically, he ordered individuals in his organization to pay Lopez Parra, a commander in La Procuraduria General de la Republica (the PGR), Luis Esteban Villalon, who was in charge of the federal police for northern Mexico, and Coello Trejo, the Deputy General for the PGR $1.5 million per month. Garcia Abrego also had Francisco Perez purchase clothing for employees of Trejo on a number of occasions. On each occasion, Perez spent from $50,000 to $80,000.

Garcia Abrego also protected his organization by attempting to maintain a low profile. At one point, he informed Perez that he intended to kill two Mexican reporters because they were writing "too many personal things in the newspaper" about his narcotics trafficking business. When Oscar "El Profe" Lopez Olivares, formerly a valued member of Garcia Abrego's organization,

made statements to the press threatening to expose a high-level narcotics operation in Matamoros along with its organizer, Garcia Abrego attempted to have him killed and, through Luis Medrano, enlisted the assistance of Agent DeLaO in this regard.

Lopez Olivares's statements to the press created pressure from law enforcement for Garcia Abrego. He alleviated this pressure through further bribes to government officials. He also moved to Monterey, a city deeper inside Mexico than Matamoros, and essentially went into seclusion so that he was not accessible to people outside his organization.

Sometime in late 1989 or early 1990, $10 million in bribe money from Garcia Abrego's organization failed to reach Coello Trejo. In January 1990, Mexican officials jailed eighteen members of Garcia Abrego's group for possession of firearms, cocaine, and marijuana. Because of pressure from Mexican law enforcement, Garcia Abrego moved to his sister's home in McAllen, Texas and later to an apartment in Chicago. Shortly thereafter, Mexican officials seized Garcia Abrego's ranches and other property in Matamoros.

In December 1990, Garcia Abrego discovered that he was named in a federal indictment that had recently been unsealed, and he therefore fled back to Monterey. After his return to Monterey, Garcia Abrego purchased several million dollars worth of properties, including ranches, which he used as hideouts. From 1991 though 1994, Garcia Abrego remained in hiding and changed locations at least every few weeks and sometimes every few days. Though he was in hiding, Garcia Abrego continued to

meet with members of his organization to discuss the drug business. Pursuant to Garcia Abrego's orders, Carlos Resendez acted as an intermediary through whom other members of the group, including Oscar Malherbe and Luis Medrano, went in order to meet with Garcia Abrego.

In 1996, Mexican authorities arrested Garcia Abrego after Resendez informed them where he was hiding. Within a few days, Mexican authorities flew Garcia Abrego to the United States and placed him in the custody of U.S. law enforcement officials.

II. PROCEDURAL BACKGROUND

A grand jury indicted Garcia Abrego on twenty-two counts of a twenty-eight-count indictment, including ten counts of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), five counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), three counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), one count of conspiracy to possess cocaine and marijuana with intent to distribute in violation of 21 U.S.C. § 846, one count of conspiracy to launder money in violation of 18 U.S.C. § 1956(h), one count of conspiracy to import cocaine and marijuana in violation of 21 U.S.C. § 963, and one count of conducting a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848. After a lengthy trial, the jury found Garcia Abrego guilty of all twenty-two counts. The district court dismissed the conspiracy to possess cocaine and marijuana with intent to distribute and conspiracy to

import cocaine and marijuana counts because they constituted lesser-included offenses of conducting a CCE. The district court imposed a sentence consisting of concurrent terms of life imprisonment followed by concurrent five-year terms of supervised release for the CCE count and for each count of possessing cocaine with intent to distribute. The court sentenced Garcia Abrego to concurrent 240-month terms of imprisonment followed by concurrent 3-year terms of supervised release for the count of conspiracy to launder money and for each of the substantive money laundering counts. The district court also imposed a fine of $128,312,098 and ordered Garcia Abrego to forfeit $350,000,000 in United States currency and substituted assets. Garcia Abrego appeals his conviction and sentence as to all counts.

III. DISCUSSION

Garcia Abrego appeals his conviction and sentence on the following fourteen grounds:

1. The government's payment of witnesses, grants of immunity, and plea bargaining so distorted the adversary process at Garcia Abrego's trial that the proceedings were rendered fundamentally unfair.

2. The district court erred in declining to give a requested jury instruction explaining the non-reciprocal nature of the government's offer of incentives to witnesses.

3. The district court improperly entered a judgment of conviction on the charged substantive drug offenses because it gave the jury a Pinkerton instruction only with

respect to the count charging Garcia Abrego with conspiracy to possess cocaine and marijuana with intent to distribute, a count that it later dismissed.

4. Insufficient evidence supported Garcia Abrego's convictions of the substantive drug offenses.

5. Insufficient evidence supported Garcia Abrego's convictions of money laundering.

6. Insufficient evidence supported Garcia Abrego's conviction of conspiracy to launder money.

7. Insufficient evidence supported Garcia Abrego's conviction of conducting a CCE.

8. Garcia Abrego's conviction of conspiracy to launder money violated the Ex Post Facto Clause because it was based on conduct that occurred prior to the enactment of the harsher penalty provisions of 18 U.S.C. § 1956(h).

9. Garcia Abrego's custodial statement at the Houston FBI office was rendered involuntary by the fact that it followed an un-Mirandized prior custodial statement made while Garcia Abrego was under the influence of drugs forcibly administered by authorities bringing Garcia Abrego to the United States.

10. Garcia Abrego's inability to understand his Miranda rights rendered his custodial statement involuntary and therefore inadmissible on Fifth Amendment grounds.

11. The district court erred in admitting expert testimony regarding the effect of habitual Valium use.

12. The district court's order of criminal forfeiture violated the Double Jeopardy Clause because it was based in

part upon two counts of the indictment that constituted lesser-included offenses of another offense of conviction.

13. The district court's admission of testimony that implicated Garcia Abrego in several murders violated Rules 403 and 404(b) of the Federal Rules of Evidence.

14. The district court's admission of foreign records of financial transactions into evidence violated 18 U.S.C. § 3505, the Confrontation Clause, and a number of the Federal Rules of Evidence.

We address each of these issues in turn.

A. The Government's Provision of Inducements to Its Witnesses

Garcia Abrego contends that the government's extensive use of incentives such as motions for downward departure pursuant to § 5K1.1 of the Sentencing Guidelines, Rule 35 reductions in sentence, immigration permits, cash payments, and grants of immunity from prosecution to motivate many government witnesses to testify denied him his constitutional right to due process. He argues that, because he was denied the opportunity to offer similar incentives to obtain testimony, the adversarial process was skewed to an exceptional degree in the government's favor and that his constitutional right to due process was thereby violated. Garcia Abrego's claim lacks merit.

This court has observed that "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and

having that witness testify under a plea bargain that promises him a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (en banc). We have also noted that a witness who receives financial compensation in exchange for testimony has less of an incentive to testify falsely than a witness who testifies in exchange for a reduced sentence. See *id.* Accordingly, "as in the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness." See *id.* at 315.[1]

We have acknowledged that the government must observe certain procedural safeguards when it intends to offer testimony of a witness receiving some sort of compensation for his testimony. See *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994). Specifically, these safeguards include the following:

The government must not use or encourage the use of perjured testimony; the government must completely and timely disclose the fee arrangement to the accused in accordance with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); the accused must be given an adequate opportunity to cross-examine the informant

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[1] Garcia Abrego urges us to "reconsider" our decision in Cervantes-Pacheco. However, in the absence of any intervening Supreme Court or en banc circuit authority that conflicts with Cervantes-Pacheco – and Garcia Abrego has pointed to none – we are bound by our decision in that case. "It has long been a rule of this court that no panel of this circuit can overrule a decision previously made by another." *Ryals v. Estelle*, 661 F.2d 904, 906 (5th Cir. Nov. 1981). This principle applies a fortiori here because Cervantes-Pacheco is an en banc decision.

and government agents about any agreement to compensate the witness; and the trial court should give a special jury instruction pointing out the suspect credibility of paid witnesses. *Id.* Garcia Abrego does not contend that the government or the district court failed to comply with any of the above safeguards.

Garcia Abrego contends that he does not seek to resurrect any per se barrier to the admissibility of testimony by witnesses compensated by the government. Rather, he contends that " 'due process', fundamental fairness and an accused's meaningful right to some parity in the compulsory process of witnesses will [not] tolerate a system that permits only one side of the adversary process to utilize . . . non-reciprocal incentives to entice witnesses." This court rejected a virtually identical argument in *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B Jan. 1982). In that case, the defendants argued that "the government's granting immunity to its witnesses while denying immunity to [the defendants' prospective witness] skewed the evidence against [the defendants] and denied them a fair trial." *Id.* at 639. This court rejected the defendants' argument, noting that "no Fifth Circuit case has upheld a grant of immunity by a trial court, and our cases have strongly suggested, without specifically deciding, that courts lack such power under any circumstances." *Id.* at 639 n.25. The court observed that the only situation in which due process even arguably warrants a judicial grant of immunity to a defense witness is a situation in which the government abuses its power to grant immunity to such a degree that it denies the defendant a fair trial. See *id.* at 640-41; see also *United States v. Bustamante*, 45 F.3d 933, 943 (5th Cir. 1995) ("It is also

settled that, unless the government has abused its immunity power, a defendant has no due process right to have the trial court immunize defense witnesses."); *United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992) ("District Courts have no inherent power to grant immunity. A district court may not grant immunity simply because a witness has essential exculpatory evidence unavailable from other sources."). Garcia Abrego has alleged no abuse on the part of the government in this case. Indeed, he has not even alleged the existence of witnesses who would have been willing to testify in his favor had he been able to offer them incentives similar to those offered by the government.

Garcia Abrego nonetheless argues that "the issue here presented is not whether [a] defendant must be accorded immunity for defense witnesses, but rather whether and at what point the prosecution's advantage in obtaining favorable testimony so substantially distorts the delicately balanced adversarial process as to render such proceedings unfair." Garcia Abrego's argument thus appears to boil down to a contention that the sheer number of witnesses who received some sort of consideration from the government in exchange for their testimony rendered his trial fundamentally unfair. However, we see no logical basis for departing from the principle articulated in Cervantes-Pacheco and Bermea – that " 'it is up to the jury to evaluate the credibility of a compensated witness' " – based merely upon the number of witnesses that received inducements from the government in exchange for their testimony. *Bermea*, 30 F.3d at 1552 (quoting *Cervantes-Pacheco*, 826 F.2d at 315). Garcia Abrego's claim that the government violated his right to

due process through the use of inducements to obtain favorable testimony from witnesses therefore lacks merit.

B. Jury Instruction on the Nonreciprocal Nature of Inducements to Government Witnesses

Garcia Abrego contends that, even if the pervasiveness of the government's practice of compensating its witnesses monetarily and otherwise did not of itself violate his right to due process, the district court nonetheless erred in refusing his proposed jury instruction pointing out the non-reciprocal nature of such compensation (i.e., the fact that only the government could offer witnesses incentives such as motions for downward departure and reduction of sentence) and indicating to the jury that the government's witnesses who obtained benefits in exchange for their testimony had a motivation to lie. Garcia Abrego's proposed instruction read in pertinent part as follows:

Under the current law, the only way that a cooperating witness can receive a reduction of his sentence below the numerically determined guideline range or the mandatory minimum is if a prosecutor files a motion with the sentencing judge asking the judge to reduce the sentence of the witness. You have heard the terms "5K1.1" and "Rule 35" during this case. Those are legal terms that refer to motions filed by the prosecutor to reduce the sentence of a witness based on the witness' cooperation and "substantial assistance" to the government in the arrest or prosecution of another individual. If the prosecutor files the motion before the witness is sentenced, the motion is called a "5K1.1 motion." If the motion is

filed after the witness is sentenced, it is called a "Rule 35 motion." The decision to file a "5K1.1 motion" or "Rule 35 motion" is within the sole discretion of the prosecutor. Simply because a witness testifies truthfully does not mean that the prosecutor will file a "5K1.1 motion" or "Rule 35 motion" on the witness' behalf.

Sentencing judges are powerless to reduce the sentence of a cooperating witness below the mandatory minimum or applicable guideline unless the prosecutor files the "5K1.1 motion" or "Rule 35 motion" on behalf of a witness. Moreover, the defense lawyers in this case have no power to file a "5K1.1 motion" or "Rule 35 motion" on behalf of a witness who testifies, and therefore, are powerless to help a cooperating witness receive a reduced sentence.

Therefore, you must carefully evaluate the testimony of any government witness who is cooperating, or has cooperated, in exchange for or with the hope that the prosecutor will file a "5K1.1 motion" or "Rule 35 motion" to reduce the sentence of the witness. You should consider that such a witness may be motivated to please the prosecutor, since only the prosecutor, not the defense lawyers, can help that witness obtain a reduction of his sentence. You must consider the testimony of such a witness with great caution and care.

Garcia Abrego contends that the above instruction was justified in light of the pervasiveness of the government's use of inducements to obtain testimony from its witnesses. He argues that the court's standard cautionary instruction that the jury should view the testimony of an "accomplice" or "informer for pay or for immunity from

punishment" with greater caution than other testimony was insufficient to adequately instruct the jury on this issue. We disagree.

District courts are afforded "substantial latitude in formulating jury charges." *United States v. Asibor*, 109 F.3d 1023, 1034 (5th Cir.), *cert. denied*, 139 L. Ed. 2d 182, 118 S. Ct. 254 (1997), and *cert. denied sub nom.*, 118 S. Ct. 638 (1997). To that end, we review a district court's refusal to give a proposed jury instruction only for an abuse of discretion. See *id.*; *United States v. Pineda-Ortuno*, 952 F.2d 98, 105 (5th Cir. 1992). Reversal on the basis of a district court's rejection of a proposed jury instruction is appropriate only if the rejected instruction (1) is substantively correct, (2) is not substantially covered in the charge given, and (3) pertains to an important point in the trial such that failure to give the instruction impairs the defendant's ability to present a given defense effectively. See *United States v. Pipkin*, 114 F.3d 528, 535 (5th Cir. 1997).

The district court's instructions cautioning the jury regarding its evaluation of the testimony of accomplices and paid informants tracks the language of the Fifth Circuit Pattern Jury Instructions relating to these issues. See COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIR., PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 25-26 (1997). This court has held that these instructions adequately safeguard a criminal defendant when the government offers the testimony of a compensated informant. See *United States v. Goff*, 847 F.2d 149, 161 & n.13 (5th Cir. 1988); *United States v. D'Antignac*, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980). The district court could thus properly conclude that the instruction that it gave covered the substance of

Garcia Abrego's proposed instruction.[2] Therefore, the district court's rejection of Garcia Abrego's proposed jury instruction did not constitute an abuse of discretion.

C. Impact of the Dismissal of the Drug Conspiracy Count on the Substantive Drug Convictions

Counts 3-10, 17, and 28 of Garcia Abrego's indictment charged him with violations of 21 U.S.C. § 841(a)(1), which criminalizes the knowing possession of controlled substances, including cocaine and marijuana, with intent to distribute. Garcia Abrego contends that his convictions for these substantive drug offenses are not sustainable on a theory of coconspirator vicarious liability. Garcia Abrego notes that the jury received a Pinkerton instruction in connection with the conspiracy to possess cocaine with intent to distribute count which instructed the jury that, if it found Garcia Abrego guilty of that count, it

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[2] We also note that Garcia Abrego's proposed instruction, while perhaps not a technically inaccurate statement of the law, at a minimum had the potential to confuse or mislead the jury. The proposed instruction focuses exclusively on the role of the prosecutor and fails to state expressly that only the court has the authority to grant a § 5K1.1 or Rule 35 motion. The district court could thus properly conclude that Garcia Abrego's proposed instruction could have given the jury the mistaken impression that the prosecutor actually possesses the authority to reduce the sentences of government witnesses. See *United States v. Tucker*, 137 F.3d 1016, 1036 (8th Cir. 1998) (holding that the district court did not abuse its discretion in denying the defendant's proposed instruction because it had the potential for "misleading the jury and would have focussed the jury's attention on collateral issues").

could convict him of any substantive drug offenses committed by a coconspirator in furtherance of the conspiracy even though Garcia Abrego did not participate in the substantive offenses or have any knowledge of them. See *Pinkerton v. United States*, 328 U.S. 640, 645-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). However, after the jury returned a verdict of guilty with respect to all counts, the district court dismissed the drug conspiracy count because it constituted a lesser-included offense of conducting a CCE.

Garcia Abrego argues that he could not be convicted pursuant to the Pinkerton instruction because the district court dismissed the drug conspiracy count upon which the charge was based. He therefore contends that his convictions for the substantive drug offenses cannot stand because insufficient evidence exists to prove that he is directly liable for these offenses – that is, insufficient evidence exists for the jury to conclude beyond a reasonable doubt that he actually or constructively possessed the cocaine in question with intent to distribute it. The gist of Garcia Abrego's argument appears to be that he cannot be convicted of the substantive drug offenses on a coconspirator vicarious liability theory because the district court did not enter judgment convicting him on the drug conspiracy count even though the jury found him guilty on that count. Garcia Abrego has cited no authority in support of this contention.

Assuming, merely for the sake of argument, that a conspiracy conviction is a necessary predicate to a conviction of substantive offenses on the basis of a theory of coconspirator vicarious liability, such a conviction exists in this case because the jury also found Garcia Abrego

guilty of conducting a CCE, and the district court entered a judgment of conviction on this count. The Supreme Court has held that conspiracy constitutes a lesser-included offense of conducting a CCE. See *Rutledge v. United States*, 517 U.S. 292, 134 L. Ed. 2d 419, 116 S. Ct. 1241 (1996). Therefore, in finding Garcia Abrego guilty of conducting a CCE, the jury necessarily found that he participated in a conspiracy. Garcia Abrego's conviction of conducting a CCE is thus tantamount to a conspiracy conviction. See *United States v. Graewe*, 774 F.2d 106, 108 (6th Cir. 1985) ("A [CCE] charge is a conspiracy charge, and one convicted of a CCE is subject to Pinkerton liability.").[3]

The jury instruction in this case expressly apprised the jury of the Pinkerton principle. As the government observes, in finding Garcia Abrego guilty of the drug conspiracy count, the jury found beyond a reasonable doubt that a drug conspiracy existed and that Garcia

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[3] Garcia Abrego contends that the CCE conviction provides no basis for sustaining his substantive drug convictions on a theory of coconspirator vicarious liability because the Pinkerton instruction did not inform the jury that, if it found Garcia Abrego guilty of conducting a CCE, it could convict him of any substantive drug offenses committed in furtherance of the CCE. However, the authorities that Garcia Abrego cites in support of this proposition establish nothing more than that the jury charge must inform the jury of the Pinkerton principle in order for a conviction of a substantive offense to be sustainable on the basis of coconspirator vicarious liability. See *United States v. Sanchez-Sotelo*, 8 F.3d 202, 208 (5th Cir. 1993); *United States v. Pierce*, 893 F.2d 669, 675-76 (5th Cir. 1990). As indicated supra, the jury charge accurately apprised the jury of the Pinkerton principle.

Abrego was a voluntary participant in this conspiracy. Moreover, the district court dismissed the drug conspiracy count only because it constituted a lesser-included offense of the CCE count of which the jury also found Garcia Abrego guilty. We therefore conclude that the district court's dismissal of the drug conspiracy count in connection with which the jury received the Pinkerton instruction does not foreclose our affirmance of Garcia Abrego's convictions of the substantive drug offenses on the basis of coconspirator vicarious liability.

D. Sufficiency of the Evidence Supporting the Substantive Drug Convictions

Garcia Abrego further argues that, even if the district court's dismissal of the drug conspiracy count in connection with which the jury received the Pinkerton instruction does not foreclose our affirmance of his convictions on the substantive drug counts on a theory of coconspirator vicarious liability, we must nonetheless reverse these convictions because insufficient evidence exists to support them on the basis of such a theory. We disagree.

Criminal convictions are supported by sufficient evidence "if a reasonable trier of fact could conclude that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the jury's verdict and drawing all reasonable inferences from the evidence to support the verdict." *United States v. Mmahat*, 106 F.3d 89, 97 (5th Cir.), *cert. denied*, 139 L. Ed. 2d 138, 118 S. Ct. 200 (1997). As indicated below, we conclude that, viewing the evidence in the light most favorable to the verdict, the jury could

have concluded beyond a reasonable doubt (1) that Garcia Abrego was involved in a criminal conspiracy and (2) that the substantive drug offenses were committed in furtherance of the conspiracy. We therefore conclude that sufficient evidence exists to support Garcia Abrego's convictions of the substantive drug counts.

1. Sufficiency of the evidence establishing a conspiracy

Circumstantial evidence may establish the existence of a conspiracy, as well as an individual's voluntary participation in it, and "circumstances altogether inconclusive, if separately considered, may, by their number and joint operation . . . be sufficient to constitute conclusive proof." *United States v. Roberts*, 913 F.2d 211, 218 (5th Cir. 1990) (internal quotation marks omitted). "Therefore, we have consistently held that the jury may infer the existence of a conspiracy from the presence, association, and concerted action of the defendant with others." *United States v. Gonzales*, 121 F.3d 928, 935 (5th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 664, 118 S. Ct. 726 (1998), and *cert. denied*, 140 L. Ed. 2d 141, 118 S. Ct. 1084 (1998). To be convicted of engaging in a criminal conspiracy, an individual "need not know all the details of the unlawful enterprise or know the exact number or identity of all the co-conspirators, so long as he knowingly participates in some fashion in the larger objectives of the conspiracy." *United States v. Westbrook*, 119 F.3d 1176, 1189 (5th Cir. 1997), *cert. denied sub nom.*, 118 S. Ct. 1059 (1998), and *cert. denied sub nom.*, 118 S. Ct. 1060 (1998); see also *United States v. Fernandez-Roque*, 703 F.2d 808, 814-15 (5th Cir.

1983). Furthermore, a conviction may be sustained solely on the basis of the testimony of a coconspirator – even a coconspirator who testifies on the basis of a plea bargain or promise of leniency – so long as that testimony is not incredible as a matter of law – that is, so long as it does not defy the laws of nature or relate to matters that the witness could not have observed. See *Bermea*, 30 F.3d at 1552.

In this case, the record contains evidence more than ample to support the jury's conclusion that Garcia Abrego engaged in a conspiracy that had as its objects the violation of federal narcotics and money laundering laws. The testimony of numerous coconspirators establishes that Garcia Abrego cast a conspiratorial net that was far-reaching and encompassed a large number of individuals who aided in his drug trafficking enterprise. Outlined below is the testimony that established the general framework of Garcia Abrego's organization.

Carlos Resendez testified that he engaged in the drug trafficking business with Garcia Abrego beginning in 1976 and later went to work for him in that business full time, continuing until his arrest in April 1994. Resendez testified that Garcia Abrego met directly with Luis Medrano, Oscar Malherbe, and Sergio "Checo" Gomez regarding the narcotics trafficking business. He also testified that Garcia Abrego was Medrano and Malherbe's boss, as well as the head of the entire drug organization. Francisco Perez testified that he began moving drugs for Garcia Abrego in 1980 and continued to do so until his arrest in August 1993. Agent Claudio DeLaO testified that, during conversations with Luis Medrano, Medrano referred to Garcia Abrego as "El Jefe" and "Patron," both

Spanish words signifying substantial authority. In a recorded statement, Medrano also stated that he went to work for "El Jefe" after Casimiro Espinoza, Medrano's former employer in the drug trafficking business, was killed. According to the testimony of a number of Garcia Abrego's coconspirators, including Carlos Rodriguez, Tomas "Gringo" Sanchez supervised cocaine distribution for Garcia Abrego's group in the New York area until he was killed.

The individuals who worked directly with Garcia Abrego, along with Sanchez, arranged for the transportation of drugs and proceeds from their sale in the United States through a number of other individuals. Tony Ortiz testified that he transported cocaine into the United States at the direction of Luis Medrano. Francisco Segura testified that he originally worked for Tony Ortiz and was later ordered by Medrano and Malherbe to collect drug debts in New York. Carlos Rodriguez testified that he began trafficking cocaine at the direction of Medrano and Malherbe in 1986 and that they dictated the Colombian cartel with whom he was allowed to do business. William Allen Hoffman testified that he delivered ten to twenty loads of cocaine for Medrano and that, when he delivered loads to New York, his contact person there was Sanchez. Jaime Rivas testified that he transported cocaine from Harlingen to Houston for Luis Medrano and that he met with Medrano regarding the transportation of cocaine up to two or three times per week. Rivas also testified that Elias "El Profe" Garcia and Hilario Gonzalez were involved in arranging transportation of cocaine for the group. Tony Ortiz testified that Juan Ibarra worked for Sanchez receiving cocaine and arranging for the shipment

of drug proceeds back down south to Houston. Horace Vega, who testified that he moved money for the group and acted as a confidential informant for the FBI, testified that Ibarra replaced Sanchez as the point man for the group's operations in New York after Sanchez was killed.

A number of coconspirators testified that Garcia Abrego utilized several individuals to manage the proceeds of his drug trafficking enterprise. Francisco Perez testified that Fernando Herrerra was in charge of managing Garcia Abrego's drug proceeds. Perez also testified that Garcia Abrego instructed Ricardo Aguirre, who the documentary evidence indicated was listed as a beneficial owner on several of the investment accounts in which Garcia Abrego placed his drug proceeds, to move $25 million from Mexico to the United States during the time period that Garcia Abrego was hiding in Chicago as a result of increased pressure and property seizures by Mexican authorities. Additionally, a number of witnesses testified that Garcia Abrego's group employed a number of pilots, hit men, and body guards.

Garcia Abrego himself told federal law enforcement officials during an interview that he began trafficking marijuana in 1979 and switched to cocaine in 1987. He stated that he moved between 800 and 1000 pounds of marijuana and 100 kilograms of cocaine per month. He also stated that he progressed to moving loads of cocaine ranging from 150 to 200 kilograms. He told federal law enforcement agents that he moved narcotics across the U.S./Mexico border with the assistance of Mexican judicial police, who would inform him when he could safely move a load across the border.

Clearly the jury was presented with sufficient evidence for it to rationally conclude beyond a reasonable doubt that a wide-ranging criminal conspiracy of which Garcia Abrego knew and in which he participated existed. Furthermore, sufficient evidence existed for the jury to rationally conclude beyond a reasonable doubt that each of the substantive drug offenses charged was committed in furtherance of the conspiracy.

2. Sufficiency of the evidence linking the substantive drug offenses to the conspiracy

As an initial matter, we note that Garcia Abrego does not contest that sufficient evidence exists to prove that the substantive drug offenses alleged were committed by someone; rather he alleges that the evidence was insufficient to link the offenses to him. We conclude that sufficient evidence existed for the jury to conclude that each of the substantive drug offenses was committed by one or more of Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 3 of the indictment was based upon the seizure of 825 kilograms of cocaine at the Sarita, Texas border patrol checkpoint on March 14, 1989. The cocaine was discovered in a secret compartment in an 18-wheeler driven by Raciel Garcia Contreras and also occupied by Juan David Garcia. Jaime Rivas testified that he informed Medrano about the load of cocaine lost at the Sarita checkpoint and that Medrano instructed Malherbe to tell "El Senor" about the lost load. At this point, Medrano informed Rivas that Garcia Abrego was the boss and that he had to be told about the seizure. From this evidence,

the jury could reasonably conclude that the drug offense described in count 3 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 4 was based upon the seizure of 291 kilograms of cocaine from a Tioga motor home driven by William Hoffman in Queens, New York on May 3, 1989. Hoffman testified that he purchased the motor home at the direction of Medrano and that Medrano instructed him to take the motor home to Grand Prairie, Texas to have a false bottom put in it. Hoffman also testified that the seized cocaine was loaded into the motor home under the supervision of Hilario Gonzalez and at the direction of Elias "El Profe" Garcia. From this evidence, the jury could reasonably conclude that the drug offense described in count 4 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 5 of the indictment was based in part upon the seizure of 415 kilograms of cocaine from the residence of Frederico Munguia on Krenek Road in Houston, Texas on August 28, 1989. Carlos Rodriguez testified that Munguia transported cocaine for the drug organization with which he, Garcia Abrego, Medrano, and Malherbe were involved. Additionally, Rivas testified that, on August 29, 1989, he contacted Medrano and told him that the cocaine that he had delivered to Munguia the previous evening had been seized. According to Rivas, Medrano then instructed him to contact Munguia in San Antonio and have him come to Houston. Based upon this evidence, the jury could reasonably conclude that the drug offense charged in count 5 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 6 was based upon the seizure of twenty kilograms of cocaine from a mustang driven by Emilio Rivera as he left the residence of Hilario Gonzalez's father-in-law on Arrowrock Road in Houston and 160 kilograms of cocaine seized from the residence itself on September 18, 1989. Rivas testified that Gonzalez used the Arrowrock residence to store cocaine that Rivas delivered to him in Houston. Additionally, Rivas testified that Medrano informed him of the seizure of cocaine at the Arrowrock residence. From this evidence, the jury could reasonably conclude that the drug offense charged in count 6 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 7 was based upon the seizure of 645 kilograms of cocaine from a residence on Ridgeside Street in North Houston. FBI agents testified that, prior to the seizure, they were conducting surveillance at Bonnie's Nursery, a nursery near Humble, Texas on September 22, 1989. The agents observed a large white refrigerator truck and a van. The agents testified that several individuals were taking items out of the truck and placing them in the van. The vehicles departed. Subsequently, FBI agents had local law enforcement officials stop the truck, and the driver was identified as Jaime Rivas. The van drove to the Ridgeside residence and backed up to the residence's garage. An FBI agent walked by the residence and overheard the sound of heavy objects being dropped and dragged across the floor of the garage. A later search of the residence uncovered 645 kilograms of cocaine in military-style duffle bags of a type similar to duffle bags found by the FBI at Bonnie's Nursery. Rivas testified that he was subsequently informed of the seizure by Elias "El

Profe" Ruiz. From this evidence, the jury could reasonably conclude that the drug offense described in count 7 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 8 was based upon the seizure of approximately 9 tons of cocaine from a residence on Bass Boulevard near Harlingen, Texas on October 4, 1989. Rivas testified that he moved between 30,000 and 40,000 kilograms of cocaine through the Bass Boulevard location. Law enforcement officials also seized ledgers at the Bass Boulevard residence indicating that cocaine had been shipped from the location on August 28, 1989, the same date as the seizure of cocaine at Krenek Road, and indicating that 645 kilograms of cocaine had been shipped at some point prior to September 29, 1989, which coincided with the size and date of the shipment seized from the Ridgeside residence on September 22, 1989.

Francisco Perez testified that he showed Garcia Abrego a newspaper article reporting the Bass Boulevard seizure and that, in response, Garcia Abrego stated that "the boys had goofed." Perez also testified that everyone in the drug trafficking organization, including Garcia Abrego, referred to Medrano and Malherbe as "the boys." Resendez testified that he had a conversation with Garcia Abrego about the Bass Boulevard seizure. He testified that Garcia Abrego was angry and stated that the seizure was a result of having too many people involved in the organization. He also testified that Garcia Abrego stated that the individuals arrested in connection with the Bass Boulevard seizure had been calling, asking him for help.

Based upon this evidence, the jury could reasonably conclude that the drug offense charged in count 8 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 9 was based upon the seizure of 603 kilograms of cocaine from a tractor-trailer rig stuck in a ditch at a warehouse located on Almeda-Genoa in Houston on November 6, 1989. The warehouse was located directly in front of a house on South Wayside, a street that runs perpendicularly to Almeda-Genoa. A search of the house on South Wayside revealed duffle bags similar to the ones discovered in the search of Bonnie's Nursery. Rivas testified that an individual he knew as "Bono," whom an FBI agent identified as Jose Bernardo Nieto, had previously shown him the Almeda-Genoa warehouse and indicated that it was a potential delivery point for cocaine in Houston. Rivas also testified that, during a telephone conversation, Nieto told him that he had lost a load of cocaine at the Almeda-Genoa warehouse. Tony Ortiz testified that he had met Nieto at Medrano's home, where Nieto was meeting with Medrano to discuss cocaine transportation. According to Ortiz, Nieto had lost a load of the organization's cocaine, and Medrano did not want to use him for transportation anymore. Medrano met with Nieto to make arrangements for Nieto to turn over the cocaine that he still had to Ortiz for transportation. Based upon this evidence, the jury could reasonably conclude that the drug offense described in count 9 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 10 was based upon the seizure of two loads of cocaine, both in excess of 300 kilograms, from the Nole

Hace Ranch and from a mobile home in Jones Creek, Texas. One of the FBI agents involved in the seizure at the Almeda-Genoa warehouse testified that he was conducting surveillance at the Wharton airport in Houston and that he observed a blue pickup registered to Guadalupe Velez. The agent testified that he had previously observed a black pickup registered to Velez at the Almeda-Genoa warehouse. FBI agents followed the blue pickup to the Nole Hace Ranch, which is located near Clute, Texas. As the blue pickup drove into the ranch, it was met by the black pickup that agents had previously observed at the Almeda-Genoa warehouse. Both trucks drove back toward the ranch. Later that afternoon, the blue truck drove back to the Wharton airport and then to the mobile home in Jones Creek, which was owned by Guadalupe Velez's sister. FBI agents subsequently searched the mobile home and the Nole Hace Ranch, discovering more than 300 kilograms of cocaine at each location. Phone records seized at the Almeda-Genoa warehouse and the Nole Hace Ranch indicated that one telephone call had been made from the South Wayside house located behind the Almeda-Genoa warehouse to the Nole Hace Ranch and that four telephone calls were made from the Nole Hace Ranch to the South Wayside house. As noted earlier, Rivas testified that the Almeda-Genoa warehouse was a potential delivery point for the organization's cocaine. Based upon this testimony, in connection with the circumstantial evidence surrounding the two seizures at issue in count 10, the jury could reasonably infer that the drug offense described in count 10 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 17 was based upon the seizure of 850 kilograms of cocaine recovered from a warehouse on Sunshine Strip in Harlingen leased to Benito Gonzales and a truck that was searched shortly after it left the warehouse. Benito Gonzales was the brother of Marcos Gonzales, who Tony Ortiz testified worked for him transporting cocaine. Ortiz also testified that Benito Gonzales helped his brother in picking up, packaging, and delivering cocaine. Prior to searching the truck, U.S. customs officials had executed a search warrant on the warehouse and discovered metal boxes filled with cocaine and sealed inside wooden crates. Upon searching the truck, customs officials found cocaine packed in the same manner. This evidence, combined with Tony Ortiz's testimony regarding his involvement in the overall conspiracy constitutes ample evidence from which the jury could reasonably conclude that the drug offense charged in count 17 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 28 was based upon the seizure of 1000 kilograms of cocaine that were delivered to the New Jersey warehouse of George Paulicastro, an individual who was cooperating with the DEA. Carlos Rodriguez testified that he arranged shipments of cocaine to George Paulicastro's warehouse in New Jersey. A special agent for the DEA testified that, when the load of cocaine reached Paulicastro's warehouse on April 3, 1993, all but 10 kilograms of it was replaced with fake cocaine. Carlos Rodriguez testified that he was arrested in connection with the delivery. On April 9, 1993, Paulicastro delivered the cocaine in a rental truck to Francisco Segura. Segura

was later arrested, and at that time he had in his possession a telephone book containing a code that Segura testified was given to him by Medrano for use in deciphering encoded telephone numbers given to Segura by group members. Based upon this evidence, the jury could reasonably conclude that the drug offense described in count 28 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

E. Sufficiency of the Evidence Supporting the Substantive Money Laundering Convictions

Garcia Abrego claims that insufficient evidence exists to support his convictions of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(2)(A). We conclude, however, that the government adduced evidence sufficient to support each count of conviction.

1. Section 1956(a)(1)(A)(i)

Counts 2, 11-13, and 16 charged Garcia Abrego with laundering money in violation of 18 U.S.C. § 1956(a)(1)(A)(i), which criminalizes engaging in a financial transaction involving the proceeds of an unlawful activity with the intent to promote a specified unlawful activity.[4] For purposes of § 1956(a)(1), a transaction is " 'a

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[4] Section 1956(a)(1) provides in relevant part as follows:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity – (A)(i) with the intent to promote

purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition' or some action involving a financial institution or its facilities." *United States v. Puig-Infante*, 19 F.3d 929, 938 (5th Cir. 1994) (quoting 18 U.S.C. § 1956(c)(3)). " 'Disposition' most commonly means 'a placing elsewhere, a giving over to the care or possession of another.' " *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 654 (Philip Babcock Grove ed. 1961)).[5]

Garcia Abrego contends that the evidence adduced at trial was insufficient to support his convictions for counts 2, 11-13, and 16 because (1) the government failed to prove a transaction involving the funds at issue in each count because it offered no evidence of a disposition of

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the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. 18 U.S.C. § 1956(a)(1).

[5] A particular transaction constitutes a "financial transaction" if it "in any way or degree affects interstate or foreign commerce [and] (i) involves the movement of funds by wire or other means or (ii) involves one or more monetary instruments." 18 U.S.C. § 1956(c)(4)(A); see also *Puig-Infante*, 19 F.3d at 938. As indicated infra, Garcia Abrego challenges only the sufficiency of the evidence to establish that the funds at issue in each count alleging a violation of § 1956(a)(1)(A)(i) were involved in a transaction. He does not contend that any transaction in which the government proved the funds were involved did not meet the above definition of financial transaction. Therefore, we address only the issue of whether sufficient evidence existed for the jury to conclude beyond a reasonable doubt that the funds at issue in each count were subject to a transaction.

the funds and (2) none of the funds were transferred to Garcia Abrego.[6] We disagree. Sufficient evidence exists for the jury to conclude that the funds at issue in each of these counts were utilized in some form of transaction and that the money laundering offenses were committed by Garcia Abrego's coconspirators in furtherance of the conspiracy described in Part III.D.1, supra.

Count 2 was based upon the seizure of $4,012,549 on February 4, 1989 from a secret compartment in a van at Rapid Truck Repair in Houston. A special agent for the Criminal Investigation Division of the Internal Revenue Service testified that, on February 1, 1989, Alexander Guzman and Hector Castano had driven the van to Memorial City Mall. At the mall, they turned the van over to Fernando Cordona and Henry Cortez, who had arrived at the mall in another vehicle. From this point forward, law enforcement officials maintained constant surveillance of the van until the time of its seizure. Cordona and Cortez took the van to a residence on Langbourne Street in Houston. The next day, Cortez drove the van back to Memorial City Mall and turned it over to an unidentified individual who drove the van to Rapid Truck Repair. The jury could reasonably conclude that this series of events involved one or more dispositions of the money later recovered from the van because, on more than one occasion, the van, along with its contents, was

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[6] Garcia Abrego does not challenge the sufficiency of the evidence to establish that the money at issue in each of the money laundering counts constituted the proceeds of narcotics trafficking or that the transfers at issue were made for the purpose of promoting narcotics trafficking activity.

"given over to the care or possession of another." *Puig-Infante*, 19 F.3d at 938 (internal quotation marks omitted).

Jaime Rivas testified that he was responsible for delivering the load of money seized at Rapid Truck Repair to Matamoros, Mexico and that he received his instructions on the disposition of the money from Luis Medrano. From this testimony, the jury could reasonably conclude that the money laundering offense described in count 2 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 11 was based upon the seizure of $2.4 million that resulted from the search of a Jeep Wagoneer driven by Juan Miguel "Gordo" Lizardi Garcia at the International Bridge. Carlos Resendez testified that Lizardi Garcia worked for Garcia Abrego's organization. An FBI agent testified that, prior to this seizure, law enforcement officials intercepted a telephone conversation between Tomas "Gringo" Sanchez and Hilario Gonzales. Hilario Gonzales subsequently ordered Guadalupe Manuel Lopez to rent a large U-Haul truck, load it with clothing and furniture, and turn it over to other individuals in the southwest part of Houston. Law enforcement officials observed Lopez comply with these orders on April 7, 1997. The individuals to whom Lopez turned over the truck drove it to the Southwest Terrace Apartments on Bassford in Houston. Tony Ortiz testified that he had an apartment in this complex.

Two days later, Lopez drove the truck to a residence in Brownsville on Monterey Street. He then turned the vehicle over to some individuals at that residence and left for the airport. Law enforcement officials then observed

these unidentified individuals unload the contents of the truck, dumping all of the clothing and furniture into the yard and taking 21 U-Haul boxes into the house. Law enforcement officers maintained surveillance on the Monterrey Street house until April 11, 1990. The entire time, the clothing and furniture remained dumped in the yard. Law enforcement officials also observed a Jeep Wagoneer at the Monterey Street house. On April 11, Lizardi Garcia was stopped on the International Bridge in this same Jeep Wagoneer. A search of the vehicle revealed U-Haul boxes filled with bundles of U.S. currency.

The above evidence would allow the jury to conclude that the funds seized from the Jeep Wagoneer had been "given over to the care or possession of another" one or more times, thus establishing the transaction element of the money laundering offense. *Puig-Infante*, 19 F.3d at 938 (internal quotation marks omitted). Furthermore, the involvement of Tomas "Gringo" Sanchez and the use of Tony Ortiz's apartment in transporting the money, along with Resendez's testimony that Lizardi Garcia worked for Garcia Abrego's group, provides sufficient evidence for the jury to reasonably conclude that the money laundering offense described in count 11 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 12 is based upon $108,000 that Horace Vega received at Carpet Masters in Houston from Jesse Ceballos on February 23, 1991. Vega testified that, in January 1991, he met with Luis Medrano and discussed building a frozen food warehouse that would be used to distribute cocaine. Medrano agreed to pay the $3.5 million necessary to set up the warehouse. He stated that he

would provide Vega with $100,000 to secure a contract for the warehouse's construction and would pay $1 million a week after the contract was secured. Thereafter, he would pay $1 million per year until the contract price was paid. Medrano told Vega that he would receive the money from Jesse Ceballos and Juan Ibarra in Houston.

On two subsequent occasions, Vega attempted to arrange to pick up the $100,000 in Houston, but did not receive it. On the second attempt, Juan Ibarra told him that he could not pay the $100,000 because the group was attempting to reestablish protection in Mexico. Thereafter, Vega spoke with Medrano again, and Medrano became upset when he found out that Vega had not been able to pick up the money necessary to secure a contract for the warehouse. In a later taped conversation, Vega and Jesse Ceballos arranged for Vega to pick up the money at Carpet Masters. The transfer of the $108,000 to Vega clearly constituted "a giving over to the care or possession of another," and thus a transaction for purposes of establishing a money laundering offense. *Puig-Infante*, 19 F.3d at 938. Additionally, the involvement of Luis Medrano in the transfer and the fact that the transfer was made to facilitate the building of a warehouse to be used to distribute narcotics provide ample basis for the jury to conclude that the offense described in count 12 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 13 was based upon Vega's receipt of $50,000 from Alex Ceballos, the brother of Jesse Ceballos, at Carpet Masters on May 3, 1991. In recorded conversations on May 2, 1991, Vega and Jesse Ceballos discussed Vega's having a secret compartment built into a trailer for the

transport of cocaine. Vega told Ceballos that he would need $50,000 to have this done. Additionally, Juan Ibarra was present when Vega picked up the money on May 3, 1991. The conveyance of the money to Vega constituted a transaction. Given that Medrano had previously told Vega to contact Ceballos and Ibarra in connection with another transaction, the jury had ample basis for concluding that the money laundering offense described in count 13 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 16 was based upon Vega's payment of $7,965 for 8 trash compactors and 700 bags for use in packaging marijuana. Vega testified that he received orders from Jesse Ceballos to purchase the trash compactors because Luis Medrano needed them to package 40,000 pounds of marijuana. The government offered into evidence a recorded conversation between Vega and Ceballos to this effect. Vega testified that he then went to Houston, met up with Oscar Abelenda, a cocaine dealer who was a customer of Ceballos. Vega and Abelenda then purchased the trash compactors and bags. The jury could reasonably conclude that Vega's purchase of the trash compactors and bags entailed a transaction within the meaning of § 1956(a)(1). See 18 U.S.C. § 1956(c)(3) (defining transaction to include a purchase). Further, based upon the fact that Vega undertook the transaction pursuant to orders from Medrano to purchase materials and equipment necessary to facilitate drug trafficking, the jury could reasonably conclude that the offense described in count 16 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

2. Section 1956(a)(2)(A)

Counts 14, 15, and 27 charged Garcia Abrego with violation of 18 U.S.C. § 1956(a)(2)(A), which criminalizes the transportation, transmission, or transfer of a monetary instrument or funds from a place inside the United States to a place outside the United States with the intent to promote the carrying on of a specified unlawful activity. See *United States v. Savage*, 67 F.3d 1435, 1440 (9th Cir. 1995).[7] As with the substantive drug offenses, Garcia Abrego does not contend that the evidence was insufficient to establish that the offenses charged in counts 14, 15, and 27 occurred.[8] Rather, he contends that insufficient

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[7] Section 1956(a)(2) provides in relevant part as follows:

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. 18 U.S.C. § 1956(a)(2).

[8] Garcia Abrego asserts that the funds at issue in these counts were not exported to Matamoros, Mexico. However, with respect to counts 14 and 15, the record citations that he provides in support of this proposition do not indicate that the funds at issue were not exported to Matamoros, Mexico. Furthermore, as indicated infra, the evidence presented at trial indicated that the funds at issue in these two counts were transported across the Mexican border, which satisfies § 1956(a)(2)(A)'s requirement that the funds be transferred from a point inside the United States to a point outside the United States.

evidence exists to link him to the offenses. However, as with the counts alleging violations of § 1956(a)(1)(A)(i), we conclude that sufficient evidence exists to demonstrate that the offenses were committed by Garcia Abrego's coconspirators in furtherance of the conspiracy. Accordingly, Garcia Abrego's convictions are sustainable on a theory of coconspirator vicarious liability.

Count 14 was based upon the delivery of $1.4 million of the organization's funds from Houston to Matamoros, Mexico on September 7, 1991. Vega testified that, on September 6, 1991, he picked up $1.4 million from Jesse Ceballos at a residence in Houston pursuant to instructions from Malherbe and Medrano. He further testified that, pursuant to his instructions from the prior day, on September 7, 1991, he turned the money over to an individual that he knew as Pinata, who transported the money into Mexico. Based upon Vega's testimony that he acted at the behest of Malherbe and Medrano, the jury could reasonably conclude that the money laundering offense described in count 14 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 15 was based upon the delivery of $1.463 million of the organization's money from Houston to

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Furthermore, as indicated infra, the funds at issue in count 27 were seized from a vehicle on the International Bridge driving toward Mexico. The fact that the funds were seized before they actually passed from the United States into Mexico is irrelevant for purposes of § 1956(a)(2)(A) because the statute also criminalizes an "attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States." 18 U.S.C. § 1956(a)(2) (emphasis added).

Matamoros on September 26, 1991. Vega testified that, pursuant to instructions from Jesse Ceballos, he picked up the money in Houston on September 25, 1991. He testified that he then drove the money to the Rio Grande Valley, where he met Carlos Salazar. From there, Salazar's sister, Ninfa Lopez, drove Vega's vehicle, and Vega road with Salazar to the Mexican border. At the border, Salazar told a Mexican Customs official that they worked for El Senor, and they were waived through. Vega testified that they then delivered the money to Matamoros. Based upon this testimony, the jury could reasonably conclude that the money laundering offense described in count 15 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

Count 27 was based upon the seizure of $528,000 from a vehicle driven by Roberto Villareal as he attempted to cross into Mexico on the International Bridge on May 6, 1992. Carlos Rodriguez testified that Villareal was the cousin of Sergio "Checo" Gomez and that he was helping the organization smuggle drug proceeds into Mexico at the time of this seizure. Based upon this testimony, the jury could reasonably conclude that the money laundering offense described in count 27 was committed by Garcia Abrego's coconspirators in furtherance of the conspiracy.

F. Sufficiency of the Evidence Supporting the Conviction for Conspiracy to Launder Money

Count 18 of Garcia Abrego's indictment charged him with conspiracy to launder money in violation of 18 U.S.C. § 1956(h). Section 1956(h) provides as follows:

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956(h). This court has not had occasion to determine what elements of proof are necessary to establish a violation of § 1956(h). However, the Third Circuit has held that a conviction for violation of § 1956(h) requires that the government prove the following three elements:

(1) the conspiracy, agreement, or understanding to commit money laundering was formed, reached, or entered into by two or more persons; (2) at some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and (3) at some time during the existence or life of the conspiracy, agreement, or understanding, the defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement or understanding.

United States v. Conley, 37 F.3d 970, 976-77 (3d Cir. 1994).

The Supreme Court has held that a conviction of conspiracy to commit a drug crime in violation of 21 U.S.C. § 846 does not require proof of an overt act in furtherance of the conspiracy. See *United States v. Shabani*, 513 U.S. 10, 15, 130 L. Ed. 2d 225, 115 S. Ct. 382 (1994).

Section 846 has language virtually identical to the language of § 1956(h).[9] Neither the Supreme Court nor this court has had occasion to determine whether 18 U.S.C. § 1956(h) also lacks an overt act requirement. We need not address this issue here because the substantive money laundering offenses discussed in Parts III.E.1 and III.E.2, supra, satisfy an overt act requirement, should such a requirement exist.

Because we have concluded that Garcia Abrego's convictions for laundering money in violation of § 1956(a)(1)(A)(i) and (a)(2)(A) are sustainable on a theory of coconspirator vicarious liability, we necessarily conclude that sufficient evidence exists for the jury to have concluded beyond a reasonable doubt that Garcia Abrego knowingly participated in a conspiracy, one of the objects of which was to commit money laundering offenses involving drug proceeds.

G. Sufficiency of the Evidence Supporting the Conviction for Conducting a CCE

Count 20 of Garcia Abrego's indictment charged him with conducting a CCE in violation of 21 U.S.C. § 848. "A conviction for [CCE] requires proof that a defendant organized, supervised or managed five or more persons in a continuing series of drug violations from which the

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[9] Section 846 provides as follows:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. 21 U.S.C. § 846.

defendant obtained substantial income." *United States v. Sotelo*, 97 F.3d 782, 789 (5th Cir.), *cert. denied sub nom.*, 117 S. Ct. 620 (1996), and *cert. denied*, 117 S. Ct. 1002 (1997), and *cert. denied sub nom.*, 117 S. Ct. 1324 (1997); see also *Garrett v. United States*, 471 U.S. 773, 786, 85 L. Ed. 2d 764, 105 S. Ct. 2407 (1985). Garcia Abrego argues that the government failed to prove that he derived substantial income from the sale of narcotics and that he organized, led, managed, or supervised five or more individuals. We reject both of these contentions.

1. Substantial Income

In support of his contention that the government failed to prove that he derived substantial income from the sale of narcotics, Garcia Abrego merely cross-references those portions of his brief arguing that insufficient evidence existed to convict him of laundering money and that the district court improperly allowed the admission of foreign bank records. As indicated in Part III.E, supra, we reject Garcia Abrego's argument that insufficient evidence existed to support his convictions for money laundering. As indicated in Part III.N, infra, we reject his argument that the district court improperly admitted the foreign financial records.

Moreover, in May 1988, Dr. Victor Leal, a Brownsville-area ophthalmologist whom Garcia Abrego used as a liason [sic] for communicating with Agent DelaO, told DelaO in a recorded conversation that, ten years ago Garcia Abrego was a factory worker and that now he was a "big boss." Francisco Perez testified that Garcia Abrego told him that he had ordered Ricardo Aguirre to launder

$25 million of his money. Carlos Resendez testified that Garcia Abrego told him that he had $30-35 million in Ricardo Aguirre's name. Tony Ortiz testified that, during his involvement with Garcia Abrego's organization, he shipped between $60 and 70 million in drug proceeds from New York and Houston back to Matamoros. Horace Vega testified that he moved $7.5 million for the organization. Clearly, the jury had ample basis from which to conclude that Garcia Abrego derived substantial income from trafficking narcotics.

2. Organization, Management, or Supervision of Five or More Individuals

Garcia Abrego conclusorily argues that insufficient evidence existed for the jury to conclude beyond a reasonable doubt that he acted as an organizer, supervisor, or manager of five or more individuals in his narcotics trafficking activities. The testimony of Garcia Abrego's coconspirators summarized in Part III.D.1, supra, constitutes sufficient evidence for the jury to conclude that Garcia Abrego acted in such a capacity with far more than five people. The government adduced a great deal of evidence in the form of testimony from coconspirators indicating that Garcia Abrego was the leader of a very large narcotics trafficking enterprise with a pyramid-like hierarchy. The testimony of coconspirators provided a basis for the jury to conclude (1) that Luis Medrano and Oscar Malherbe worked directly for Garcia Abrego and that he delegated to them substantial managerial authority; (2) that Medrano and Malherbe in turn delegated responsibility for smuggling drugs and their proceeds to

individuals such as Jaime Rivas, Tony Ortiz, and Carlos Rodriguez; and (3) that these individuals in turn recruited numerous other individuals to actually package, load, and ship narcotics and their proceeds. The fact that Garcia Abrego did not directly control the actions of many of these individuals is irrelevant; that their actions were directly supervised or managed by individuals to whom Garcia Abrego delegated authority indicates that Garcia Abrego organized, supervised, or managed them for purposes of § 848. See *United States v. Tolliver*, 61 F.3d 1189, 1216 (5th Cir. 1995) (holding that the defendant possessed managerial authority over individuals for purposes of the CCE statute because they worked for one of the defendant's subordinates), vacated on other grounds, *Sterling v. United States*, 516 U.S. 1105, 133 L. Ed. 2d 834, 116 S. Ct. 900 (1996), and vacated on other grounds, *Moore v. United States*, 136 L. Ed. 2d 4, 117 S. Ct. 40 (1996); *United States v. Hinojosa*, 958 F.2d 624, 630 (5th Cir. 1992) (" '[A] defendant may not insulate himself from CCE liability by carefully pyramiding authority so as to maintain fewer than five direct subordinates.' " (quoting *United States v. Ricks*, 882 F.2d 885, 891 (4th Cir. 1989) (brackets in original)).

Apparently recognizing the futility of simply arguing that the jury could not rationally conclude beyond a reasonable doubt that he organized, managed, or supervised five or more individuals in his drug trafficking enterprise, Garcia Abrego principally argues that his conviction for conducting a CCE must be set aside because the jury could have concluded that he supervised individuals who as a matter of law could not constitute his supervisees (e.g., individuals with whom Garcia Abrego

merely had a buyer/seller relationship). In essence, Garcia Abrego is challenging the district court's jury instruction on the CCE offense on the ground that it allowed the jury to convict him based upon a theory of liability that was not legally viable. See *Griffin v. United States*, 502 U.S. 46, 59, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991) (noting that a conviction is invalid "when . . . jurors have been left the option of relying upon a legally inadequate theory . . . [because] there is no reason to believe that their own intelligence and expertise will save them from that error"). Because Garcia Abrego did not object to the CCE instruction on these grounds at the district court level,[10] we review his claim for plain error. See FED. R. CRIM. PROC. 52(b); *United States v. Jones*, 132 F.3d 232, 243 (5th Cir. 1998).

Under the plain error standard, we may reverse only if "(1) there was error (2) that was clear and obvious and (3) that affected [Garcia Abrego's] substantial rights." *United States v. Dupre*, 117 F.3d 810, 817 (5th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 756, 118 S. Ct. 857 (1998); see also *United States v. Olano*, 507 U.S. 725, 731-36, 123 L. Ed.

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[10] Garcia Abrego proffered a proposed supplemental instruction on CCE stating the following:

> The act of supplying cocaine, or "fronting" cocaine to a customer does not constitute without more, a basis for determining that the supplier organized, managed or supervised either his buyers or his buyers [sic] customers.

However, during formal objections to the district court's jury charge, Garcia Abrego withdrew this proposed instruction "because the Court [was] giving [it] in other ways, shape or form."

2d 508, 113 S. Ct. 1770 (1993). "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong" of the plain error inquiry. *Olano*, 507 U.S. at 735. Even when these criteria are satisfied, we should exercise our discretion to reverse only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732 (internal quotation marks and brackets omitted); see also *Dupre*, 117 F.3d at 817.

The jury instruction regarding the organizer/supervisor/manager element of the CCE offense tracked the language of the Fifth Circuit Pattern Jury Charge, which provides as follows:

> The term "organizer, supervisor, or manager" means that the defendant was more than a fellow worker and that the defendant either organized or directed the activities of five or more other persons, whether or not the defendant was the only organizer or supervisor.
>
> COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIR., PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 239 (1997).

Assuming, merely for the sake of argument, that a juror strictly complying with this instruction – as we assume that the jurors in this case did, see *United States v. Jimenez*, 77 F.3d 95, 99 (5th Cir. 1996) – could have, as a theoretical matter, found Garcia Abrego guilty of conducting a CCE on the basis of his association with persons who could not have constituted his supervisees as a

matter of law,[11] we are unconvinced that such error rises to the level of plain error. As noted above, the

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[11] We acknowledge that a number of circuits have held that the statutory language, "other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management" indicates that the term "organizer" as used in § 848 implies a position carrying some degree of managerial authority rather than a position characterized by mere coordination of various players. See, e.g., *United States v. Lindsey*, 123 F.3d 978, 987-88 (7th Cir. 1997); *United States v. Williams-Davis*, 319 U.S. App. D.C. 267, 90 F.3d 490, 508-09 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 986 (1997), and *cert. denied sub nom.*, 117 S. Ct. 988 (1997); *United States v. Witek*, 61 F.3d 819, 822-24 (11th Cir. 1995); *United States v. Delgado*, 4 F.3d 780, 785-86 (9th Cir. 1993). One court indicated that a CCE instruction similar to the one at issue here was erroneous because it failed to highlight the requirement of managerial authority. See *Lindsey*, 123 F.3d at 985-86.

We have no occasion here to determine whether an individual must exercise managerial authority over another individual in order to be considered an organizer as to that individual for purposes of § 848 or whether the district court's instruction was erroneous because of its failure to elucidate such a managerial authority requirement, should it exist, because our review in this case is limited to a review for plain error. As noted infra, (1) the government presented a great deal of evidence indicating that Garcia Abrego exercised managerial authority, both direct and indirect, over a large number of individuals and (2) Garcia Abrego does not contend that, during argument, the government urged the jury to convict Garcia Abrego of conducting a CCE based upon his association with individuals over whom he did not exert direct or indirect managerial authority. We are satisfied that any error in the district court's instruction was not plain error because Garcia Abrego has demonstrated no prejudicial impact, and thus no detrimental effect on his substantial rights. See *United States v. Rogers*, 126 F.3d 655, 659 (5th Cir. 1997). We therefore express no opinion as to whether the district court's CCE instruction was actually erroneous.

government adduced a great deal of evidence at trial regarding a large number of individuals over whom the jury could reasonably conclude that Garcia Abrego exerted direct or indirect managerial authority. Furthermore, Garcia Abrego does not contend that, during argument, the government urged the jury to find Garcia Abrego guilty of conducting a CCE on the basis of his association with individuals who, as a matter of law, could not have constituted his supervisees. Rather, he merely claims that a handful of the government's witnesses could not have constituted his supervisees.[12] We find it highly improbable that, in finding Garcia Abrego guilty of conducting a CCE, the jury rested its verdict upon Garcia Abrego's association with such individuals rather than upon his association with the numerous individuals whom the jury could have correctly concluded were his supervisees. Garcia Abrego has thus failed to demonstrate that any error on the part of the district court in connection with its jury instructions on the CCE offense prejudiced him and thereby affected his substantial rights. Therefore, we hold that the district court did not plainly err, if it erred at all, in its instruction to the jury regarding the CCE

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[12] We find Garcia Abrego's assertions in this regard somewhat dubious themselves. For example, Garcia Abrego claims that William Hoffman could not have constituted his supervisee because Hoffman described himself as a freelance courier and stated that he worked for a number of different individuals. However, Hoffman testified that he took orders from Oscar Malherbe and Luis Medrano. This testimony indicates that Garcia Abrego exercised indirect managerial authority over him. See *Tolliver*, 61 F.3d at 1216. Obviously, § 848 does not require that an individual work exclusively for the defendant in order to be considered the defendant's supervisee.

offense. See *United States v. Lindsey*, 123 F.3d 978, 986 (7th Cir. 1997) (holding that the district court did not plainly err in giving the jury an instruction regarding CCE that could have allowed the jury to convict the defendant on the basis of his association with individuals who could not have been his supervisees as a matter of law because there was "adequate evidence of [the defendant's] supervision of a sufficient number of persons whom he clearly 'managed' ").

H. Impact of the Ex Post Facto Clause on the Money Laundering Conspiracy Conviction

Garcia Abrego contends that all of the acts that formed the basis of his conviction for conspiracy to launder money occurred before October 28, 1992, the effective date of 18 U.S.C. § 1956(h), which raised the maximum penalty for such a conspiracy to the same level as the underlying substantive offense. See 18 U.S.C. § 1956(h). He also argues that, even if only one of the acts comprising the offense occurred before § 1956(h)'s effective date, the Ex Post Facto Clause precludes applying the statute's harsher penalty provisions to the offense.

As an initial matter, we reject Garcia Abrego's argument that his conviction under § 1956(h) violated the Ex Post Facto Clause if any of the conduct in furtherance of the conspiracy occurred before the statute's effective date. Conspiracy is a continuing offense. See *Bermea*, 30 F.3d at 1577. " 'Where a crime is still being carried on and continued after the date when the act becomes effective,' a statute imposing a greater penalty for conspiracy does not violate the constitutional prohibition of ex post facto

laws." *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984) (quoting *Huff v. United States*, 192 F.2d 911, 914-15 (5th Cir. 1951)); see also *United States v. Harris*, 79 F.3d 223, 229 (2d Cir.), *cert. denied*, *136 L. Ed. 2d 89, 117 S. Ct. 142 (1996)*; *Bermea*, 30 F.3d at 1577; *United States v. Garfinkel*, 29 F.3d 1253, 1259 (8th Cir. 1994); *United States v. Jackson*, 845 F.2d 1262, 1265 (5th Cir. 1988).

In circumstances in which many acts in a continuing offense occurred before the effective date of the statute criminalizing the continuing offense, the trial court must inform the jury of the effective date of the statute and instruct the jury that, in order to convict the defendant of the offense, it must find that the offense continued after the effective date of the statute. See *Todd*, 735 F.2d at 150. The district court gave such an instruction in this case, and the government presented ample evidence that the conspiracy to launder money occurred after the effective date of § 1956(h).

Among the post-October 1992 evidence supporting Garcia Abrego's conviction of conspiracy to launder money is the testimony of Carlos Resendez that he participated in a large cocaine transaction in 1993 and turned the proceeds over to Garcia Abrego in Monterey, Mexico. Additionally, Resendez testified that he picked up money in the United States for Garcia Abrego in 1993. Resendez also testified that he engaged in a cocaine transaction in 1994 and that he delivered the money pursuant to Garcia Abrego's instructions. Furthermore, Tony Ortiz testified that, in November 1992, he delivered approximately $40,000 to Medrano for use in bribing a Mexican official. Based upon this evidence, the jury could reasonably conclude that the money laundering conspiracy continued

after the effective date of § 1956(h). Therefore, Garcia Abrego's conviction for violation of § 1956(h) did not violate the Ex Post Facto Clause.

I. Admissibility of Garcia Abrego's Custodial Statement

Garcia Abrego challenges the admissibility of the statement that he made to U.S. law enforcement officials after he was transferred to U.S. custody by Mexican authorities. Before addressing Garcia Abrego's claims regarding his custodial statement, a synopsis of the facts surrounding that statement is necessary.

1. Factual Background

Mexican law enforcement officials arrested Garcia Abrego in Monterey, Mexico on the night of January 14, 1996. Mexican officials flew Garcia Abrego to Mexico City that night, and DEA Agent Lawrence Hensley accompanied them on the flight. During the flight, Garcia Abrego drank some tequila. Without giving Garcia Abrego Miranda[13] warnings, agent Hensley asked Garcia Abrego questions about his citizenship and the seizure of cocaine and money. The government contends that Garcia Abrego made no specific admissions of wrongdoing, and Garcia Abrego does not specify the content of his statement.

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[13] *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Garcia Abrego stayed the night in Mexico City in the custody of Mexican officials. The next morning, he received injections of a number of blood pressure medications. That afternoon, Mexican officials took Garcia Abrego to the airport in Mexico City. Garcia Abrego requested an attorney or to be taken before a judge.[14]

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[14] In a post-oral argument letter brief that, pursuant to court instructions, was to address only the adequacy of record support for arguments that had already been made, Garcia Abrego argues for the first time that his request for a lawyer while in the custody of Mexican authorities constituted an invocation of his Fifth Amendment right to counsel. He therefore contends that his later custodial statement at the FBI office was presumptively involuntary because he was not provided access to a lawyer prior to the statement. See *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981) (holding that, once the accused asserts this Fifth Amendment right to counsel and thereby "expresses his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police").

"This court has repeatedly held . . . [that] we will not review arguments raised for the first time in a reply brief." *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1342 (5th Cir. 1993). We will not allow Garcia Abrego to do in a limited post-oral argument submission that which he could not do in a reply brief. We therefore decline to resolve Garcia Abrego's Edwards claim. However, we note that Garcia Abrego does not claim that, at the time that he made his request for counsel, he was being subjected to custodial interrogation. It is highly questionable whether Garcia Abrego could have invoked his Fifth Amendment right to counsel at a point in time prior to custodial interrogation, particularly at a point when he was not even in the custody of U.S. officials. As the Supreme Court observed in *McNeil v. Wisconsin*, 501 U.S. 171, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991),

Mexican officials complied with neither request. While detained at the airport, Garcia Abrego received two ten-milligram injections of Valium. He was then placed on a Mexican airplane occupied by only Mexican officials and flown to Houston Intercontinental Airport.

Shortly after arriving in Houston, Garcia Abrego was released into United States custody and was taken to the Houston FBI office. Upon arrival there, he complained of shoulder and back pains that he alleged resulted from Mexican officials forcibly pushing him to the ground and restraining him. Dr. Gary M. Coleman examined Garcia Abrego, and concluded that he "appeared to be alert[,] . . . was able to converse and answer his questions appropriately[,] . . . did not appear to be somnolent or sleepy, . . . [and did not appear] . . . to be suffering from an excessive amount of any certain medication at the time." Additionally, the law enforcement officials who interviewed Garcia Abrego testified that he showed no signs of impairment at the time of the interview.

Thereafter, U.S. law enforcement officials read Garcia Abrego his Miranda rights in Spanish, and he signed a

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We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than "custodial interrogation[.]" . . . Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Id. at 182 n.3 (citations omitted); see also *Goodwin v. Johnson*, 132 F.3d 162, 180 n.14 (5th Cir. 1997).

form acknowledging that he understood his rights. United States law enforcement officials then interviewed him. Agent Hensley testified that Garcia Abrego made a number of denials of particular episodes of criminal activity that were identical to statements that he made to Hensley during the flight from Monterrey to Mexico City.

At the suppression hearing, Dr. Coleman testified that an overdose of Valium would be evidenced by signs of somnolence and sleepiness. He also testified that users of Valium develop a tolerance over time and that a given dose of Valium may have varying effects on a particular individual based on a number of other factors, including the level of anxiety the individual is experiencing at the time of administration, his physical size, and the route of administration. Garcia Abrego introduced expert testimony from Dr. Ernest D. Lykissa that a first-time user who received a twenty-milligram dose of Valium would be significantly impaired by the drug and that a person who took all of the medication administered to Garcia Abrego by Mexican doctors would be "literally incapacitated." However, Dr. Lykissa clarified that a habitual user could withstand a much higher dosage of Valium than a first-time user and that his conclusions regarding the combined effects of the drugs administered to Garcia Abrego were based on an assumption that he received all of the drugs at one time. Dr. Lykissa also testified that some of the hypertension medication that Garcia Abrego received would block his kidneys' ability to eliminate Valium for a six-hour period. Another expert, Dr. Gloria Keraga, testified that Valium taken in conjunction with one of the medications given to Garcia Abrego could increase suggestibility. Dr. Keraga admitted that these

effects might be different for a chronic user of Valium. Agent Hensley testified at the suppression hearing without objection that Garcia Abrego had used Valium on a daily basis for a number of years prior to his arrest.[15]

2. Admissibility

Garcia Abrego argues that his custodial statement at the FBI office was the fruit of his initial un-Mirandized statements to Agent Hensley shortly after his arrest and was therefore inadmissible at trial. He also argues that his custodial statement at the FBI office was rendered independently involuntary by the fact that he was under the influence of drugs that made him susceptible to law enforcement officials' solicitous interrogation. We reject both of these contentions.

a. Effect of prior un-Mirandized statements

Garcia Abrego's custodial statement at the FBI office was not rendered involuntary by the fact that he previously made un-Mirandized statements to Agent Hensley. Miranda merely created a prophylactic rule that establishes an irrebuttable presumption of involuntariness with respect to statements made during custodial interrogation that are not preceded by Miranda warnings. See

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[15] Additionally, at trial, Francisco Perez testified that he purchased Valium for Garcia Abrego on a number of occasions and that Garcia Abrego used Valium on a daily basis from at least 1980 until 1993. Carlos Resendez testified that he also purchased Valium for Garcia Abrego on occasion and that Garcia Abrego was accustomed to using Valium.

McNeil v. Wisconsin, 501 U.S. 171, 176, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991). Mirandized statements made subsequent to an un-Mirandized statement are not the illegal fruit of the prior statement unless the prior statement was actually involuntary as opposed to merely presumed involuntary on the basis that it was given without the benefit of Miranda warnings. See *Oregon v. Elstad*, 470 U.S. 298, 310-11, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985) (holding that, absent evidence that an unwarned statement was actually the product of police coercion, "a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible"). The record provides no indication that Garcia Abrego's statements to Agent Hensley were involuntary. Therefore, these statements did not taint Garcia Abrego's later statement at the FBI office.

b. Actual voluntariness

Garcia Abrego next argues that the drugs that Mexican officials administered to him, coupled with the solicitousness of U.S. law enforcement officials, rendered his custodial statement involuntary. We disagree. When a defendant challenges the voluntariness of a confession, the government must prove its voluntariness by a preponderance of the evidence in order for the confession to be admissible as substantive evidence at the defendant's criminal trial. See *Self v. Collins*, 973 F.2d 1198, 1205 (5th Cir. 1992). While the ultimate determination of voluntariness is a question of law reviewed de novo, this court

must accept the factual conclusions underlying the district court's determination of voluntariness unless they are clearly erroneous. See *United States v. Restrepo*, 994 F.2d 173, 183 (5th Cir. 1993).

"A confession is voluntary if, under the totality of the circumstances, the statement is the product of the accused's free and rational choice." *United States v. Broussard*, 80 F.3d 1025, 1033 (5th Cir.), cert. denied sub nom., 117 S. Ct. 264 (1996). "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). However, "[a] defendant's mental condition still properly figures into the voluntariness calculus. Police exploitation of the mental condition of a suspect, using 'subtle forms of psychological persuasion,' could render a confession involuntary." *United States v. Raymer*, 876 F.2d 383, 386-87 (5th Cir. 1989) (quoting *Connelly*, 479 U.S. at 164).

The record contains ample evidence from which the district court could conclude that the drugs that Mexican authorities administered to Garcia Abrego did not impair his mental capacity. Dr. Coleman's testimony that Garcia Abrego did not appear impaired and evinced none of the symptoms of a Valium overdose, together with the testimony of the officers who interviewed Garcia Abrego that he appeared in no way impaired, provided an adequate basis for the district court's conclusion that Garcia Abrego's mental capacity was not impaired as a result of the drugs that he had been administered earlier in the day. Additionally, Agent Hensley's testimony that, during the interview, Garcia Abrego made many of the same

denials of particular episodes of criminal conduct that he had previously made to Hensley during the trip from Monterrey to Mexico when no Valium was in his system indicates that the Valium injections had not diminished Garcia Abrego's mental capacity. The district court was presented with conflicting expert testimony regarding the probable effect of Valium and the other drugs administered to Garcia Abrego, and the court was free to make credibility assessments regarding the different expert witnesses. See *United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993). Moreover, the district court was free to accord great weight to the testimony of those individuals who actually observed Garcia Abrego prior to his interview with law enforcement authorities. Thus, we cannot say that the district court's determination that the medication that Garcia Abrego received did not render him mentally impaired at the time of his interview with law enforcement officials was clearly erroneous.[16]

Moreover, Garcia Abrego has demonstrated no overreaching by law enforcement officials, which, as noted earlier, is a prerequisite to a determination that a confession is involuntary for purposes of the Fourteenth Amendment Due Process Clause. The mere fact that law

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[16] Garcia Abrego also claims that he "was particularly susceptible to entreaties by U.S. authorities" because he alleges that he was mistreated by Mexican authorities and feared their return. The only evidence that the district court heard indicating mistreatment by Mexican authorities consisted of testimony and out-of-court statements from Garcia Abrego himself, and the court was free to make a negative credibility assessment regarding this evidence. See *Ponce*, 8 F.3d at 998.

enforcement agents were solicitous and attempted to create a favorable climate for confession did not render Garcia Abrego's statement involuntary. See *United States v. Barlow*, 41 F.3d 935, 944 n.26 (5th Cir. 1994).[17] Garcia Abrego contends that the solicitousness of law enforcement officials constituted an exploitation of his vulnerable mental state. However, as indicated above, the district court had an ample basis for concluding that Garcia Abrego did not possess a vulnerable mental state capable of exploitation. Therefore, the district court properly concluded that the government established by a preponderance of the evidence the voluntariness of Garcia Abrego's statement at the FBI office. The statement was thus admissible as substantive evidence at Garcia Abrego's trial.

J. Validity of Garcia Abrego's Waiver of His Miranda Rights

In an effort to attack the admissibility of his confession from a slightly different angle, Garcia Abrego contends that he did not validly waive his Miranda rights prior to his statement to law enforcement agents at the FBI office. A defendant's waiver of his Miranda rights is

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[17] Additionally, although we have concluded that the district court's factual determination that the drugs administered to Garcia Abrego had no deleterious effect on his mental condition was not clearly erroneous, it is worth noting that the district court found, on the basis of Agent Hensley's testimony, that United States law enforcement officials had no involvement in the administration of drugs to Garcia Abrego. This factual determination was not clearly erroneous.

only effective if the waiver is knowingly, intelligently, and voluntarily made. See *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986). As with the issue of the voluntariness of a custodial confession, a district court's determination regarding the validity of a defendant's waiver of his Miranda rights is a question of law reviewed de novo, but this court accepts the factual conclusions underlying the district court's legal determination unless they are clearly erroneous. See *United States v. Flores*, 63 F.3d 1342, 1363 (5th Cir. 1995). Additionally, as with a challenge to the voluntariness of a confession, when the defendant challenges the validity of his waiver of his Miranda rights, the government bears the burden of proving the validity of the waiver by a preponderance of the evidence. See *United States v. Hurtado*, 905 F.2d 74, 76 (5th Cir. 1990).

Garcia Abrego does not dispute that the law enforcement officers who interviewed him read him his Miranda rights in Spanish and that he stated to them that he understood each of these rights. However, he argues that his impairment from the medication that he had received from Mexican doctors, coupled with his lack of education and experience with the U.S. judicial system, precluded a knowing and voluntary waiver. In support of his contention that the medication that he received precluded a voluntary waiver, Garcia Abrego points to essentially the same expert testimony to which he points in support of his contention that his custodial statement was involuntary.[18] For the same reasons outlined in Part III.I, supra,

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[18] In addition, he points to Dr. Keraga's testimony that she "[did not] imagine" that he would have been able to understand his Miranda rights.

we conclude that the district court had an adequate basis for concluding that the medication that Garcia Abrego received did not render him mentally impaired at the time law enforcement authorities read him his Miranda rights.

In further support of his contention that he could not knowingly, intelligently, and voluntarily waive his Miranda rights, Garcia Abrego points to the fact that he has only the equivalent of an eighth grade education. He also relies on the district court's statement in connection with a hearing regarding disqualification of counsel on the basis of conflicts of interest that Garcia Abrego did not understand the conflicts issue and "also [did] not have a rudimentary understanding of his constitutional rights and of the judicial process that now affects his future." At the hearing that formed the basis of the above statement by the district court, Garcia Abrego disavowed any prior experience with the United States judicial system. At a later hearing, however, Garcia Abrego admitted that he was previously charged with a criminal offense in the Southern District of Texas, was represented by counsel, and pleaded guilty. This experience provided him with some exposure to the U.S. judicial system. Furthermore, Garcia Abrego claimed that his apparent lack of understanding at the previous hearing resulted from the fact that he could not hear properly and felt poorly, and the court concluded that Garcia Abrego had firmly grasped the conflicts issue. The court further concluded, based upon its interactions with Garcia Abrego as well as the testimony of law enforcement officials regarding the answers that Garcia Abrego provided in response to their questioning, that, at the time he waived his Miranda

rights, Garcia Abrego "was of keen mind, intelligent, able to understand what was transpiring and was under no type of coercion or government oppression." As demonstrated above, the record contains ample evidence to support these factual conclusions, and the district court could therefore properly conclude that the government carried its burden of proving by a preponderance of the evidence that Garcia Abrego knowingly, intelligently, and voluntarily waived his Miranda rights.

K. Admissibility of Evidence Regarding the Effects of Habitual Valium Use

Garcia Abrego contends that the district court erred in admitting expert testimony at trial from Dr. Coleman[19] that habitual use of Valium would diminish the effect of the drug. Like other evidentiary rulings, we review a district court's decision to admit expert testimony for an abuse of discretion. See *United States v. Griffith*, 118 F.3d 318, 322-23 (5th Cir. 1997).

Garcia Abrego called Dr. Coleman as a witness. During direct examination, counsel for Garcia Abrego questioned Dr. Coleman regarding his medical examination of Garcia Abrego upon his arrival in the United States and about the effects of a number of the medications that Mexican authorities had administered to him. Counsel for Garcia Abrego and Dr. Coleman engaged in the following exchange regarding Dr. Coleman's knowledge of Valium dependency:

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[19] In his brief, Garcia Abrego incorrectly refers to Dr. Coleman as Dr. Lykissa, one of his own experts.

Q: Now, do you know anything at all, sir, about Valium habituation or Valium dependency? Have you ever studied the subject in your particular area of expertise?

A: In medical school we did study the effect of Valium and other benzodiazepines.

Q: But you wouldn't hold out to be able to render an expert opinion on that, I take it.

A: No, not – it really depends. As a physician who uses these medications on a daily basis, I have to be knowledgeable about those medications.

Q: But so far as knowing anything about habituation or dependency or holding out to be an expert, would you or not hold yourself out to be an expert in that area?

. . .

A: I don't pretend to be an expert, but I do know something about Valium situations, dependencies. Being a physician, I have to.

Q: All right. I understand. I know something about it, being a lawyer. I have to. But neither of us are experts.

A: I am not certain what the – qualifications are needed to be an expert on this medication.

Q: Would you not represent yourself here in the court as being an expert?

A: On that particular medication, I don't pretend to be an expert. But as a physician who prescribes the medication, I certainly know quite a bit about it.

On cross-examination, the government asked Dr. Coleman a number of questions regarding his medical education, training, and experience. Dr. Coleman testified that he graduated from medical school and subsequently received six years of training in internal medicine. He stated that he had pharmacological training in drugs that cause dependency and that he prescribed drugs such as Valium to patients on a daily basis. The government then asked Dr. Coleman what effect a twenty-milligram dose of Valium would have on a person who had used the drug on a daily basis for eight to ten years. Garcia Abrego objected on the ground that Dr. Coleman "had testified that he is not qualified as an expert in that area of practice." The district court overruled the objection on the ground that Dr. Coleman "had practical experience . . . sufficient to give his opinion." Dr. Coleman then testified that "someone who has taken Valium for a long period of time, depending on the doses which he has been taking, . . . may have some resistance to that medication" and that such a person "oftentimes can take dosages which are quite high and not manifest the typical symptoms of sedation of someone who does not use this medication."

Garcia Abrego contends that the district court erred in allowing Dr. Coleman to testify regarding the effects of habitual Valium use because he admitted during direct examination that he was not an expert in the area of Valium dependency. However, Dr. Coleman's statements to this effect establish nothing more than that Dr. Coleman may have been unfamiliar with the meaning of "expert" as a legal term of art. Given Dr. Coleman's

testimony regarding his medical education and substantial experience in prescribing Valium, we cannot say that the district court abused its discretion in concluding that Dr. Coleman possessed the requisite "knowledge, skill, experience, training, or education" to testify competently regarding the effects of habitual Valium use. See FED. R. EVID. 702.

Garcia Abrego also contends that the government's hypothetical question regarding the effects of a twenty-milligram dose of Valium on a person who has used the drug for many years "is not the type of hearsay reasonably relied upon by experts in [Dr. Coleman's field]" and that Dr. Coleman's answer to the question was therefore inadmissible. This argument borders on the frivolous. The hypothetical question itself was obviously not the basis of Dr. Coleman's opinion. His experience with Valium prescription and patient observation, along with his medical training, formed the basis of his opinion. An expert may testify in response to a hypothetical question containing facts that have evidentiary support in the trial record. See, e.g., *United States v. Levine*, 80 F.3d 129, 135 (5th Cir.), cert. denied, 136 L. Ed. 2d 40, 117 S. Ct. 83 (1996); 2 JOHN HENRY WIGMORE, EVIDENCE §§ 674, 679, 680 (Chadbourn rev. 1979). Garcia Abrego does not dispute that the government presented testimony from two of his coconspirators – Francisco Perez and Carlos Resendez – indicating that Garcia Abrego had used Valium habitually for many years. See note 15, supra. Thus, the district court properly allowed Dr. Coleman to answer the hypothetical question posed by the government.

L. Constitutionality of the Criminal Forfeiture

Garcia Abrego contends that the district court violated the Double Jeopardy Clause because it based its order of criminal forfeiture on all of the counts for which the jury returned a guilty verdict even though the district court dismissed two of those counts – conspiracy to possess marijuana and cocaine with intent to distribute and conspiracy to import cocaine and marijuana – as lesser-included offenses of conducting a CCE. Garcia Abrego relies on the Supreme Court's recent holding in *Rutledge v. United States*, 517 U.S. 292, 134 L. Ed. 2d 419, 116 S. Ct. 1241 (1996), that conspiracy to distribute controlled substances is a lesser-included offense of the CCE offense. See *id.* at 307. He argues that, because he was punished for conducting a CCE, he cannot also be punished for engaging in drug conspiracies. Because the amount that the district court ordered him to forfeit was based upon his engagement in a CCE as well as his engagement in a conspiracy to possess narcotics with intent to distribute and a conspiracy to import narcotics, he argues that the forfeiture violates the Double Jeopardy Clause. Garcia Abrego's argument lacks merit.

In addition to protecting against a second prosecution for the same offense after acquittal or conviction, the Double Jeopardy Clause "protects against multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). The prohibition against multiple punishments for the same offense "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499, 81 L. Ed.

2d 425, 104 S. Ct. 2536 (1984); see also *United States v. Halper*, 490 U.S. 435, 450, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). In this case, the district court ordered Garcia Abrego to forfeit an amount within the limits established by Congress.

Section 853(a) of Title 21 of the United States Code, which defines property subject to criminal forfeiture in connection with drug crimes, provides as follows:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter [which include the drug conspiracies with which Garcia Abrego was charged] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a) (emphasis added). The above language indicates that a defendant convicted of conducting a CCE must forfeit any property or contract rights affording control over the criminal enterprise in addition to the

items described in paragraphs (1) and (2) of the provision, which a defendant convicted of conspiracy to possess narcotics with intent to distribute or conspiracy to import narcotics would be forced to forfeit. See id. To the extent that Garcia Abrego's participation in drug conspiracies constituted lesser-included offenses of his participation in a CCE, the proceeds of the conspiracies were necessarily proceeds of the CCE. Therefore, the amount forfeitable as a result of the conspiracies is necessarily subsumed in the amount forfeitable as a result of the CCE. The statute would have required the district court to order Abrego to forfeit the same amount regardless of whether the court considered the conspiracy counts. Because the amount that the district court ordered Garcia Abrego to forfeit is within the limits set by Congress, the criminal forfeiture comports with the Double Jeopardy Clause.

M. Admission of Evidence of Murders

Garcia Abrego contends that the district court erred in admitting evidence that he ordered a number of murders. As noted earlier, we review a district court's evidentiary rulings for an abuse of discretion. See *United States v. Torres*, 114 F.3d 520, 525-26 (5th Cir.), cert. denied sub nom., 118 S. Ct. 316 (1997), and cert. denied, 118 S. Ct. 316 (1997), and cert. denied sub nom., 118 S. Ct. 316 (1997).

Garcia Abrego first contends that evidence that he ordered a number of murders was inadmissible under

Rule 404(b) of the Federal Rules of Evidence[20] because it constituted evidence of other crimes, wrongs, or acts offered to prove his bad character and action in conformity therewith. He further complains that he did not receive the notice required by Rule 404(b) when the prosecution intends to offer evidence of prior crimes, wrongs, or other acts for purposes other than proving action in conformity with bad character.

Admission of the evidence did not violate Rule 404(b). In order "to avoid the strictures of Rule 404(b) [regarding the admission of character evidence], all the government need do is suggest a logical hypothesis of the relevance of the evidence for purposes other than to demonstrate [the defendant's] propensity to act in a particular manner." *United States v. Krout*, 66 F.3d 1420, 1431 (5th Cir. 1995). Moreover, "evidence of acts committed pursuant to a conspiracy and offered to prove the defendant's membership or participation in the conspiracy are

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[20] Rule 404(b) provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

not extrinsic evidence," i.e., evidence of "other" acts, for purposes of Rule 404(b). *Id.*; see also *United States v. Miller*, 116 F.3d 641, 682 (2d Cir. 1997), petition for cert. filed, 66 U.S.L.W. (U.S. Jan. 26, 1998) (No. 97-7630), and petition for cert. filed, 66 U.S.L.W. (U.S. Feb. 26, 1998) (No. 97-8083). Acts committed in furtherance of the charged conspiracy are themselves part of the act charged. See *Miller*, 116 F.3d at 682. Thus, evidence of such acts constitutes intrinsic evidence – that is, direct evidence of the charged conspiracy itself. See *Miller*, 116 F.3d at 682; Krout, 66 F.3d at 1431.

The government suggested a logical hypothesis that all of the murders about which it elicited testimony were committed in furtherance of Garcia Abrego's narcotics trafficking conspiracy. The testimony regarding the murders supports this hypothesis. Specifically, Ricardo Garza testified that Garcia Abrego had Oscar "El Profe" Lopez Olivares kill Casimiro Espinoza in order to eliminate drug trafficking competition in the Matamoros area. Francisco Perez testified that Garcia Abrego told him that he had two Mexican officials killed because they were moving drugs without Garcia Abrego's knowledge or permission. Perez also testified that Garcia Abrego told him that he intended to have two newspaper reporters killed because they were writing newspaper articles exposing his drug trafficking activities. Horace Vega testified that Medrano told him that the group wished to have Lopez Olivares killed because he threatened to expose high-level members of the group to the U.S. media. All of this testimony indicates that the killings at issue were in

furtherance of Garcia Abrego's drug-trafficking enterprise. Therefore, the evidence of Garcia Abrego's involvement in the murders was not inadmissible under Rule 404(b)'s prohibition on "evidence of other crimes, wrongs, or acts . . . [offered] to show action in conformity therewith." FED. R. EVID. 404(b). Indeed, it was not evidence of "other crimes, wrongs, or acts" at all. Thus, Rule 404(b) did not require that the government provide Garcia Abrego with advance notice of its intent to offer the evidence.

Garcia Abrego also contends that allowing witnesses to testify regarding his involvement in murders violated Rule 403 of the Federal Rules of Evidence.[21] He argues that the danger of unfair prejudice created by such testimony substantially outweighed any probative value it might have because the evidence was not pertinent to the charged drug and money laundering offenses. Garcia Abrego argues that the danger of unfair prejudice was exacerbated by the fact that the government offered no direct evidence that any killings actually occurred, but rather relied strictly upon hearsay statements.

Admission of the evidence did not violate Rule 403. "Testimony presented by the government will invariably

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[21] Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

be prejudicial to a criminal defendant. But Rule 403 only excludes evidence that would be unfairly prejudicial to the defendant." *United States v. Townsend*, 31 F.3d 262, 270 (5th Cir. 1994). Because Rule 403 operates to exclude relevant evidence, application of the rule " 'must be cautious and sparing.' " *United States v. Pace*, 10 F.3d 1106, 1115-16 (5th Cir. 1993) (quoting *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979)). The acts of violence to which the evidence at issue here related were integral parts of the conspiracies and the CCE with which Garcia Abrego was charged. The fact that the evidence offered by the government consisted only of out-of-court statements accompanied by no physical evidence of murder merely goes to the weight of the evidence rather than its admissibility.[22] We therefore conclude that the district court did not abuse its discretion in admitting testimony regarding Garcia Abrego's involvement in murders. See *Miller*, 116 F.3d at 682 (holding that the district court did not abuse its discretion in admitting evidence of uncharged murders committed in furtherance of the charged narcotics conspiracy).

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[22] Garcia Abrego does not contest on appeal the district court's determination that Rule 802's general prohibition on the admission of hearsay evidence did not bar the admission of the statements on the ground that they all constituted admissions by a party-opponent. See FED. R. EVID. 801(d)(2) (defining statements of a party and statements of a party's coconspirator made during and in furtherance of the conspiracy as nonhearsay when such statements are offered against the party).

N. Admissibility of Foreign Financial Records

In support of its contention that Garcia Abrego derived substantial revenue from his drug trafficking activities, the government offered foreign bank records pertaining to approximately $30 million that it contended was transferred from Mexico to the United States, deposited in bank accounts in McAllen, Texas, and then funneled through the American Express Company to accounts in Switzerland and the Cayman Islands. Garcia Abrego levels a number of attacks at the district court's admission of these records. Specifically, he argues that admission of the records violated 18 U.S.C. § 3505, the Confrontation Clause, and several of the Federal Rules of Evidence. We address each of these arguments in turn.

1. Section 3505

Garcia Abrego initially challenges the admissibility of the foreign bank records under 18 U.S.C. § 3505. Section 3505 provides in relevant part as follows:

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification[23] attests that –

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[23] Subsection (c) of the statute defines a foreign certification as "a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country." 18 U.S.C. § 3505(c)(2).

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

18 U.S.C. § 3505.

Garcia Abrego contends that the government failed to comply with the notice requirement contained in § 3505(b) because it did not provide notice of its intention

to introduce the foreign records until over six months after his indictment[24] even though the government had been in possession of the records in connection with another prosecution for approximately two years.[25] Garcia Abrego thus argues that the government did not provide notice "as soon after the arraignment as practicable," as required by the statute and that the records were therefore inadmissible under § 3505. *Id.*

As the district court observed, the government "certainly [did] not act[] with diligence in giving [the] notice" required by § 3505(b). However, we conclude that this lack of diligence did not render the records inadmissible under the statute. The plain language of § 3505 does not make compliance with the notice requirement a prerequisite to the admissibility of evidence under the statute. First, subsection (a) of § 3505, which establishes the requirements for admissibility under the section, makes

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[24] Garcia Abrego was arraigned on February 6, 1996. The government gave notice that it intended to introduce the records on August 15, 1996.

[25] Garcia Abrego also complains that the documents were not accompanied by a proper certification as required by § 3505(a)(1). He argues without further explanation that the certifications were improper because they were made in connection with another criminal case. However, the matters that the statute requires that the certification address mirror the four requirements for rendering a normal business record admissible under the business records exception to the hearsay rule, none of which are case-specific. Compare 13 U.S.C. § 3505(a)(1) with FED. R. EVID. 803(6). Garcia Abrego advances no argument as to why the required contents of the certification would be any different in this case than in the previous one. We therefore reject this argument.

no reference to subsection (b), which establishes the notice requirement. This would indicate that compliance with the notice requirement is not a precondition of admissibility. Subsection (b) also contains a requirement that the party opposing admission of a foreign record under § 3505 must object before trial or otherwise waive the objection. This would indicate that the provisions of subsection (b) are meant to facilitate pretrial determinations of the admissibility of foreign records under § 3505 rather than establish prerequisites to admissibility under the statute. The legislative history of § 3505 bears out this conclusion.

The House Report on the bill that ultimately became § 3505 states that "the purpose of the legislation is to make foreign-kept business records more readily admissible into evidence in criminal trials in United States courts." H.R. REP. NO. 98-907, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 3578, 3578. This general statement of § 3505's purpose indicates that the procedural requirements of subsection (b) are designed to facilitate the admission of foreign business records rather than serve as an impediment to their admissibility. Furthermore, the House Report goes on to state the following:

> Subsection (b) of section 3505 is intended to promote the resolution before trial of questions concerning the admissibility of foreign business records. Subsection (b) requires that the party intending to offer the foreign business record provide written notification of that intention to all other parties to the case. Any objection to the admissibility of the foreign record must be made in writing and filed with the court before trial, and the court must decide the motion before

> trial. Failure of a party to raise an objection before trial constitutes a waiver of the objection. The court, for good cause shown, however, can grant relief from the waiver.

Id. at 6, reprinted in 1984 U.S.C.C.A.N. 3578, 3582 (emphasis added). This passage indicates that the primary purpose of subsection (b) is to force parties opposing the admission of foreign business records to lodge their objections before trial so that questions of admissibility may be resolved at an early stage. A requirement of early notice of a party's intention to offer such records is a necessary concomitant to a pretrial determination of their admissibility. Without sufficient pretrial notice of a party's intention to offer foreign business records, it would certainly be unfair to conclude that the party opposing the admission of such records has waived his or her objections to the admissibility of the records by failing to assert them pretrial. However, were we to conclude that a failure to give timely notice of an intent to offer foreign records under § 3505 bars admission of the records pursuant to the statute, we would flout § 3505's purpose by turning a requirement intended to facilitate the admission of foreign business records into a procedural barrier impeding their admission. The statute's legislative history indicates that Congress wished to "promote" pretrial resolution of evidentiary disputes regarding foreign business records, not to require such resolution. *Id.*

Section 3505 "was not intended to add technical roadblocks to the admission of foreign records, but, rather, to streamline the admission of such records." *United States v. Strickland*, 935 F.2d 822, 831 (7th Cir. 1991).

The government provided Garcia Abrego with notice of its intention to offer the foreign records twenty-six days before the suppression hearing at which the district court made the initial determination of their admissibility and forty-eight days prior to their admission into evidence at his trial. Garcia Abrego never requested more time to investigate the reliability or authenticity of the records and does not now complain that he was in any way prejudiced by the timing of the government's notice.[26] We therefore conclude that the district court did not abuse its discretion in holding that the foreign bank records were admissible under § 3505.[27]

2. Confrontation Clause

Garcia Abrego next argues that admission of the foreign records violated his rights under the Confrontation

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[26] We express no opinion as to whether a showing of prejudice resulting from untimely notice of an intent to offer foreign records could eliminate § 3505 as a potential pathway for admissibility of foreign business records.

[27] Garcia Abrego also argues that the records were inadmissible because some of them were incomplete. He argues that this fact calls into question the integrity and validity of the records, particularly in light of the fact that some of the missing records were available in connection with the previous trial but were unavailable in connection with this one. Garcia Abrego's claim again lacks merit. He does not argue that the incompleteness of the records was likely to confuse the jury, nor that the incompleteness of the records rendered them irrelevant. The district court could properly conclude that the incompleteness of any of the records went to their evidentiary weight rather than their admissibility. Therefore, the district court did not abuse its discretion in admitting the records on the ground that they were incomplete.

Clause because he was unable to cross examine the custodian of the records. He argues that, unlike ordinary domestic business records, foreign records do not occupy a well-rooted exception to the hearsay rule and lack adequate indicia of reliability to be admissible without violating the Confrontation Clause. We disagree.

The admission of the foreign business records does not violate the Confrontation Clause so long as the records "bear[] adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980); see also *United States v. Ismoila*, 100 F.3d 380, 391 (5th Cir. 1996), cert. denied sub nom., 117 S. Ct. 1712 (1997), and cert. denied sub. nom, 117 S. Ct. 1858 (1997); *Sherman v. Scott*, 62 F.3d 136, 140 (5th Cir. 1995).[28] "Evidence is considered reliable if it falls within a firmly rooted hearsay exception or is otherwise supported by a showing of particularized guarantees of trustworthiness."

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[28] In Roberts, the Supreme Court stated, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' " *Roberts*, 448 U.S. at 66. In *White v. Illinois*, 502 U.S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736 (1992), the Court clarified that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a judicial proceeding." *Id.* at 354; see also *Ismoila*, 100 F.3d at 391; *Sherman*, 62 F.3d at 140. Because the foreign bank records at issue here do not constitute "statements . . . made in the course of a judicial proceeding," their admissibility does not hinge upon the presence of the makers of the records to testify at Garcia Abrego's trial or a showing of their unavailability.

Ismoila, 100 F.3d at 391-92. "Evidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception . . . [and] must similarly be so trustworthy that adversarial testing would add little to its reliability." *Idaho v. Wright*, 497 U.S. 805, 821, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990); see also *Sherman*, 62 F.3d at 140. We believe that foreign records admissible under § 3505 satisfy these criteria.

The legislative history of § 3505 indicates that Congress adopted the statute in part based upon its view that foreign business records accompanied by the certification required by the statute possess an "inherent trustworthiness." H.R. REP. NO. 98-907, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 3578, 3580. Furthermore, the House Report discussing § 3505 indicates that the language in subsection (a) establishing the required contents of the foreign certification "is derived from Rule 803(6) of the Federal Rules of Evidence," which establishes the business records exception to Rule 802's general exclusion of hearsay, and should therefore "be interpreted in the same manner as the comparable language in Rule 803(6) is interpreted." *Id.* at 5, reprinted in 1984 U.S.C.C.A.N. 3578, 3581. "The business records exception is a firmly rooted hearsay exception." *Ismoila*, 100 F.3d at 392. Thus, to the extent that § 3505 largely mirrors the business records exception, we are confident that records admissible under the statute are "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *Wright*, 497 U.S. at 821. Our conclusion is bolstered by the fact that the statute requires district courts to exclude records otherwise satisfying its requirements if "the source of

information or the method or circumstances of preparation indicate lack of trustworthiness." 18 U.S.C. § 3505(a)(1).

In concluding that admission of records under § 3505 does not violate a defendant's rights under the Confrontation Clause, we join a number of other circuits that have addressed the issue.

In *United States v. Miller*, 830 F.2d 1073, 1078 (9th Cir. 1987), the Ninth Circuit rejected a Confrontation Clause challenge to the admission of foreign bank records under § 3505. In doing so, the court expressed the following rationale:

> Banks depend on keeping accurate records and although, as we all know, they err occasionally, their records are among the most common type of business record routinely used in our courts. The novelty of the statute is to admit the records without confrontation by the defendant with the recordkeepers. No motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here. The recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the course of business. Examination of the recordkeepers by counsel for [the defendant] could not reasonably be expected to establish anything more or less than that. If the records were in fact inaccurate, it was within [the defendant's] power to depose the recordkeepers and challenge the records. . . . As applied in [the defendant's] case to admit foreign bank records kept in the course of business, section 3505 is constitutional.

Id. at 1077-78. Other circuits have reached similar conclusions, and we now do the same. See *United States v. Ross*, 33 F.3d 1507, 1517 (11th Cir. 1994) (holding that admission of foreign records pursuant to § 3505 did not violate the defendant's rights under the Confrontation Clause); *United States v. Sturman*, 951 F.2d 1466, 1490 (6th Cir. 1991) (same). The district court's admission of foreign bank records pursuant to § 3505 did not violate Garcia Abrego's rights under the Confrontation Clause.

3. Federal Rules of Evidence

Garcia Abrego asserts a number of challenges to the admissibility of the foreign bank records under the Federal Rules of Evidence. First, Garcia Abrego challenges the relevance of the evidence on the ground that nothing linked him to the bank accounts to which the documents related. However, one of the accounts described in the record was opened in the name of Maria del Carmen Olivella.[29] Garcia Abrego concedes that this is his wife's

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[29] Garcia Abrego points out that Olivella was removed as a beneficial owner from this account a few days after it was opened. At most, this is a fact properly considered by the jury in determining the weight to give the records regarding this account in determining whether the funds in the account were traceable to Garcia Abrego. It does not indicate that the records relating to the account are irrelevant. See FED. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added)); cf. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 998 n.2 (5th Cir. 1996) (en banc) (Emilio M. Garza, J., concurring) ("The standard of

name.[30] Furthermore, the other accounts listed Ricardo Aguirre as a beneficiary. Francisco Perez testified that, while Garcia Abrego was in hiding in Chicago, he told Perez that he had instructed Aguirre to move $25 million from Monterrey to the United States. Perez testified that he met with Aguirre in Brownsville and that Aguirre told him that he was moving Garcia Abrego's money through the United States to the Cayman Islands. The funds in the Swiss and Cayman Islands accounts were traceable to accounts in McAllen, Texas owned by the Casa de Cambio Nuevo Leon and the Casa de Cambio Colon, two exchange houses located in Monterrey. All of this evidence provided ample basis for the district court to conclude that the foreign bank records had some tendency to make the fact that Garcia Abrego had derived substantial income from the sale of narcotics, an element necessary to support his conviction for conducting a CCE, more probable than it would be in the absence of the records. This is all that is necessary to render the evidence legally relevant. See FED. R. EVID. 401. The foreign records were also plainly relevant to the money laundering conspiracy count because they evidenced financial transactions of large sums of money that the jury could reasonably conclude constituted proceeds from the sale of narcotics.

Garcia Abrego next contends, without any supporting legal analysis, that admission of the foreign records

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relevancy under Rule 401 is intentionally much easier to satisfy . . . than the standard for sufficiency of the evidence . . . . ").

[30] Additionally, public records of a land transaction introduced at trial listed Garcia Abrego's wife as Maria del Carmen Olivella de Garcia.

violated Rule 403 of the Federal Rules of Evidence. Because Garcia Abrego has not demonstrated that the probative value of the records was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," this argument lacks merit. FED. R. EVID. 403.

Garcia Abrego next contends, without explanation, that admission of the records violated Rule 404(b) of the Federal Rules of Evidence. This argument also lacks merit. As demonstrated above, the foreign records constituted intrinsic evidence that Garcia Abrego engaged in a CCE and a money laundering conspiracy rather than extrinsic evidence of other crimes, wrongs, or acts offered to prove Garcia Abrego's bad character and his propensity to act in conformity therewith. Accordingly, admission of the financial records did not violate Rule 404(b). See *United States v. Davis*, 19 F.3d 166, 171 (5th Cir. 1994).

Finally, Garcia Abrego contends that admission of the foreign bank records violated Rule 802, which generally precludes the admission of hearsay. See FED. R. EVID. 802. This argument ignores the fact that § 3505 creates an exception to Rule 802. See 18 U.S.C. § 3505 (providing that foreign records meeting its criteria "shall not be excluded as evidence by the hearsay rule"); *Sturman*, 951 F.2d at 1490 ("Section 3505 establishes an exception to the hearsay rule for foreign business documents."). Rule 802 thus could not operate to preclude admission of the foreign bank records.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence.

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Not Exactly What They Bargained For: 'Influence' Case Could Lead to Tougher Laws

Barbara Grzincic
Daily Record Deputy Legal Editor

The recent case of Singleton v. U.S. may have turned prosecutorial heads – and not a few stomachs – with its holding that bargaining for testimony constitutes a bribe by U.S. government lawyers.

But here in Maryland, some see the case as a boon for victims and harsher penalties for crimes of violence.

"I don't think the General Assembly takes the issue seriously enough," said state Del. Patricia Anne Faulkner, R-Mont., who unsuccessfully has pushed for legislation to curtail plea bargains when the crimes were violent. "There is a sense that 'this is the way we've always done it, so it must be right.' "

In Singleton, a panel of the 10th U.S. Circuit Court of Appeals overturned a woman's conviction for drug trafficking and money laundering, because it was based on accomplice testimony secured through a plea bargain.

This ran afoul of a federal law that prohibits "whoever" from promising "anything of value to any person, for or because of the testimony" of that person as a witness.

"[I]t is difficult to imagine anything more valuable than personal physical freedom," the opinion by the three-judge panel states.

The panel refused to read an exception for prosecutors into the statute, relying instead on a literal reading of the text.

"[I]f the assistant United States attorney were not covered by the statutory term 'whoever,' then the statute would not prohibit her even from bribing a witness with money," the opinion said.

Fueling the fire

While the panel's decision is on hold pending en banc review by the full 12-member court, it already has ignited a debate over the proper role of plea bargains – in state court as well as federal.

"Even in capital cases, the right to plea bargain with witnesses has been upheld under Maryland case law," said Assistant Attorney General Gwynn X. Kinsey Jr. "It's not an issue here."

Maryland does have a law against witness tampering, of course, but it prohibits the use of "corrupt means," threats or force to attempt to influence the witness.

"You'd be hard-pressed to find a Maryland state judge to say a plea bargain is 'corrupt means,' " said former judge and current Baltimore attorney M. Albert Figinski. "But you might find a few legislators."

Figinski was referring to a group of lawmakers, Faulkner included, who are frustrated with the use of plea bargains to reduce the penalty for violent crime.

"Of course there are times when it's appropriate to plea bargain, but it's being used inconsistently and to thwart legislative mandates," Faulkner said.

She cited the tendency of some prosecutors to bargain away handgun charges, and with them, the mandated prison time a conviction would carry.

Since her election in 1994, Faulkner has introduced bills to regulate plea bargains in violent crimes in each session – only to see them die in the Judiciary Committee.

The only one that ever came close to passing calls for an annual report to the Attorney General, showing the number of plea bargains made in such cases and the reason for each, such as a lack of evidence or staffing constraints, she said.

"Right now, prosecutors will say the percentage of plea bargains in violent crimes is very low, but there are no figures to back that up," Faulkner said.

In Baltimore, Acting Federal Public Defender James Wyda sees both sides of the issue.

"Some of our clients do strike deals for cooperation, and we need to ensure those deals are still good," Wyda said.

On the other hand, "It seems a little artificial to distinguish between payment and freedom; if you have concerns about paying a psychologist $1,000 for his testimony, logically you should have concerns about giving a cooperator five years of freedom in exchange for his," Wyda said.

Absent from the debate is Wyda's erstwhile opponent, U.S. Attorney for the District of Maryland Lynne A. Battaglia.

Referring a reporter to the Justice Department, Battaglia noted that whatever outcome is reached by the en banc 10th Circuit, it will not affect the 4th Circuit, which includes Maryland.

But the panel decision in Singleton relies, in part, on dicta from a 4th Circuit case: U.S. v. Meinster, decided in 1980.

"We think it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case," the 4th Circuit said in Meinster.

At the rehearing, tentatively set for November, the Justice Department's case is likely to rest on at least two grounds.

First, the department may argue that plea bargains specifically are authorized by a separate federal law that allows downward departures from the sentencing guidelines based on a defendant's "substantial assistance" to prosecutors.

The 10th Circuit panel found no contradiction between the two sections, saying there were "myriad ways" a defendant could assist prosecutors without testifying in court.

The department also may turn the plain-text argument to its advantage, since the statute authorizes only fines and penalties against the wrongdoers – not exclusion of testimony.

"Exclusionary remedies for statutory violations are not favored by the courts," Figinski noted.

"The critical point in the panel's decision comes when it says that the violation in this case tainted the reliability of the evidence and that allowing a conviction based on such evidence 'would stultify the policy, which Congress has enacted into law.' "

Of course, Congress wrote the law and has the power to change it to favor prosecutors if it sees fit, public defender Wyda notes.

"That is the predictable, if unfair, outcome," he said.

Conduct unbecoming?

Beyond the violation of the anti-gratuity statute, prosecutors in Singleton were found to have violated Kansas' Rule of Professional Conduct 3.4(b).

Kansas, like Maryland, adopted RPC 3.4(b) from the Model Rules. It provides that a lawyer "shall not offer an inducement to a witness that is prohibited by law."

So, has Bar Counsel Melvin Hirshman ever run across a similar claim here?

"In the general sense of a 'claim,' defendants say that all the time," Hirshman said. "But from the Attorney Grievance Commission's perspective, there's never been a complaint of prosecutorial inducement that went to public charges."

[LOGO] NACDL News Release

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'Bought' Testimony Barred

Circuit Court Tells Prosecutors:
Tempting Witnesses Akin to Bribery

Washington, D.C. July 7, 1998 – In the wake of last week's momentous federal appeals court decision turning aside the common practice by which the U.S. Department of Justice buys testimony against accused citizens, the National Association of Criminal Defense Lawyers is urging Congress and the Justice Department to change that practice across the board. NACDL is also alerting judges and defense attorneys around the nation that the Justice Department's practice of promising leniency to jailhouse informants in exchange for their testimony must now be deemed precisely what the 10th Circuit Court of Appeals declared it is: ***a violation of the federal bribery statute.***

At the very least, federal prosecutors should be required to corroborate any such tainted testimony with non-accomplice testimony or other credible evidence – both before any grand jury and at trial – in jurisdictions which still permit such testimony, defense lawyer and NACDL President Gerald B. Lefcourt, New York, said today.

A unanimous panel of the federal 10th Circuit Court of Appeals in *United States v. Singleton* struck down the criminal conviction of Sony Evette Singleton, alleged to have been involved in illicit drug activity and money

laundering. The government essentially *purchased* the testimony of a star witness with promises not to prosecute him for certain crimes in state court and a pledge to inform the court of his cooperation. NACDL has long condemned the double standard which, until now, exempted prosecutors from the federal bribery statute, Title 18, Section 201 of the federal criminal code, and allowed prosecutors to pay for a witness' testimony in cash, or something even more valuable – the witness' liberty, by dropping charges or more lenient sentencing, or the like. (Ms. Singleton's appeal was argued by longtime NACDL member John Val Wachtel, of the law firm Klenda, Mitchell, Austerman & Zuercher, L.L.C., Wichita, KS.)

"If the American justice system is a search for truth," Lefcourt said, "that search requires that every witness testify honestly and not for personal gain. If defense lawyers were to offer a witness *anything* of value in exchange for testimony, we'd be prosecuted, pure and simple. And what is more valuable than lenient sentencing or freedom? Prosecutors pay off cooperating witnesses with promises of money, soft sentencing, and promises not to prosecute at all.

"In a landmark ruling in a case of first impression, a highly-regarded federal appeals court has now agreed with what we have been saying for years – no one should be convicted on the word of an accomplice alone. The enormous power of the government to lock up a defendant for life, or to free him altogether, creates an enormous incentive to lie. With today's inflation in sentencing – particularly with mandatory minimums – the Tenth Circuit has seen this type of deal for what it is: a violation

of the plain language of the federal bribery statute," Lefcourt noted.

NACDL President-Elect and Denver criminal defense counsel Larry Pozner, who practices in the 10th Circuit, termed last week's decision "a bombshell." "The court has ended decades of government-sanctioned bribery. A system in which the government could exchange freedom for a story they wanted to hear is a system rampant with injustice and half-truths."

"At the very least Congress should require that such questionable testimony be corroborated, as is currently required in places like New York State," Lefcourt added. NACDL's Board of Directors approved just such a resolution in May 1996. Presented by Lefcourt, the resolution states:

> *RESOLVED, that NACDL supports legislation which would require in federal criminal prosecutions that accomplice testimony be corroborated by non-accomplice testimony and/or evidence, both in the grand jury and at trial, before it can be deemed sufficient to establish either probable cause or guilt beyond a reasonable doubt.*

Right now, a federal jury in Miami is deliberating the fate of two attorneys accused of representing the alleged former heads of the Cali cocaine cartel in such a way that the government considers them principals in a 10-year conspiracy to import drugs and export money. The case is built not on familiar evidence – such as wiretaps, fingerprints and surveillance photos – but solely on the testimony of actual members of the conspiracy who pleaded guilty and hope to win their freedom by testifying against the attorneys. Last year, another federal jury acquitted

the lawyers, Michael Abbell and William Moran, of the most serious charge in the indictment and deadlocked on the other charges. The government decided to try them again, but with no more evidence than they had at the first trial – the bartered testimony of desperate men.

Juries naturally greet this type of bought-and-paid-for evidence with suspicion. Court will often instruct a jury that these "cooperating witnesses" have a *motive to lie.*

But in the case handed down last week, the 10th Circuit held, for the first time ever, that freedom-of-testimony deals *violate the plain language of the federal bribery statute.* There are good reasons why no one – even federal prosecutors – should ever be allowed to give a witness anything of value in exchange for testimony. As the court noted, there is probably nothing more valuable to a defendant facing a long prison term than the promise of freedom – a gratuity which only the government has the power to confer.

After last week's ruling, such plea bargains are prohibited in the six states that make up the federal 10th Circuit: Oklahoma, Kansas, New Mexico, Colorado, Utah and Wyoming. But this kind of prosecutorial bribery is not uncommon. Although once the preferred method of making cases in the shadowy world of organized crime, in recent years it has become standard operating procedure, whether the accused are suspected drug dealers or a medical group under investigation for Medicaid or insurance fraud, or a small business accused of overbilling on a municipal contract, or a major corporation targeted for defrauding the federal government.

NACDL President Gerald Lefcourt summed up as follows:

"The 10th Circuit's decision to exclude bought-and-paid-for testimony from alleged co-conspirators should materially enhance the truth-seeking process. One of the basic tenets of American jurisprudence, civil and criminal, is that it is a search for truth – not purchased truth or bartered-for truth, but the unvarnished truth that comes from the lips of a witness in whose integrity a jury can have confidence. When the government seeks to convict American citizens in a court of law, it must be above reproach. Promises of payment to a government witness, whether in cash, kind, or liberty, render that testimony inherently untrustworthy."

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The court's opinion in *United States v. Singleton*, written by Circuit Judge Paul J. Kelly, Jr., is online at **http://lawlib.wuacc.edu/ca10/cases/1998/07/97-3178.htm.**

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's almost 10,000 direct members – and 80 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges

committed to preserving fairness within America's criminal justice system.

Additional Background on Informant/ Cooperating Witness Testimony

Instead of diligent investigation and development of hard evidence, agents and prosecutors now find it far easier to squeeze one of the suspected participants until he cracks, agrees to say what the prosecutors want him to say, and then turns on former associates at trial. In other words, instead of hard work, so many federal cases are now made by the carrot and the stick; promises of leniency versus the near-certainty of a federal mandatory sentence. This is true in spite of the fact that juries are sometimes so turned off by the parade of paid-off informants posing as witnesses that they reject this so-called "evidence" outright. For example:

- A federal jury in New Jersey in 1987 deliberated less than a day after a 23-month trial before acquitting 24 accused organized crime members on all counts in *United States v. Accetturo*. The government's star witnesses, as it turned out, were forced to admit under oath to crimes such as murder, assault, and drug dealing. Yet the defendants were accused of what the jury could not help but perceive as the far less heinous offenses of gambling and contracting kickbacks.

- In 1996, two Miami men, Willie Falcon and Sal Magluta were tried over a five-month period, accused of smuggling 75 tons of cocaine. No less than 27 convicted drug smugglers stepped forward and claimed to

> have been Falcon and Magluta's accomplices. All were promised reductions in their sentences by federal prosecutors in exchange for their testimony. As word circulated throughout the prison system that federal prosecutors were offering sentence reductions in exchange for testimony, suddenly everyone had a story to tell. The witnesses frequently conceded their desperation to please the government. One of the government's witnesses admitted that he began cooperating in earnest with the Drug Enforcement Administration and the Bahamian government only after trying to get a gun and break out of prison in the Bahamas (the escape attempt was a month after he first agreed to cooperate). As he told the jury in the *Falcon* case, "anybody could try to get a gun and escape from Foxhill." Another cooperating witness, already sentenced to 35 years in federal prison, wrote to a friend before the trial, "They [prosecutors] made me an offer I couldn't refuse. The truth of the matter is, you have to dance to the gringo beat, because out of 35 [years], you have to do 30. And I am 38 years old, and not even the Galapagos tortoise could complete it."

Not surprisingly, not all of the "conspiracies" which have been prosecuted in federal court even were conspiracies, courts have found. Federal informants, under enormous pressure to work off charges, or simply to make money from informants' fees, have been known to manufacture "cases" out of whole cloth in order to please the prosecution:

- One of the more horrid examples of this type of outright fabrication occurred in Cleveland in 1992. More than 30 postal workers were arrested on federal drug trafficking offenses. All cases were dismissed after it was discovered that the informants fabricated the entire story.

Moreover, bought testimony can totally distort any notion of fairness or parity in sentencing. For example:

- In 1991, Salvatore "Sammy Bull" Gravano was facing life without parole, charged by federal prosecutors with being John Gotti's underboss in the Gambino crime family. Life in the federal system means just that – the convict leaves prison in a pine box. Federal prosecutors made Gravano a deal he could not refuse: plead guilty to a single racketeering count, testify, and walk out of prison a free man. During the Gotti trial, Gravano testified under oath (probably truthfully) that while a member of the Gambino family, he committed or ordered 19 murders. In consideration of his testimony, prosecutors requested he be sentenced to just 5 years in federal prison, and he served 51 months. Looked at another way, Gravano served only 2 months and 3 weeks for each confessed murder!

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Perspective

SAUCE FOR THE GOOSE

By Stuart Taylor Jr.

IT'S A FEDERAL crime – under the heading "Bribery of public officials and witnesses" – to give or promise "anything of value to any person, for or because of the testimony under oath given or to be given by such person."

Now this statute has been turned against federal prosecutors, whose ability to win convictions often depends on promising something of great value to their witnesses: freedom.

A Wichita lawyer named John V. Wachtel – reasoning from the premise that "if I paid a witness for his testimony, I'd be sitting in jail" – reached an unorthodox conclusion: Prosecutors should not be allowed to pay witnesses either, whether in cash or in the coin of leniency.

So when his client Sonya Singleton was convicted of helping a cocaine ring launder money, Wachtel (who goes by Val) played a long shot. He appealed, mainly on the ground that the prosecution had violated the statute (Sec. 201(c)(2) of Title 18) by promising leniency to a key witness for his testimony against Singleton.

Much to Wachtel's surprise, he won. In a resounding July 1 decision, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit suppressed the testimony, reversed Singleton's conviction, and awarded her a new trial. If the decision stands, it could affect thousands of other cases, including that of Timothy McVeigh, whose conviction was based in part on the plea-bargained testimony of Michael Fortier, and whose appeal is to be heard by a panel including two of the same three judges.

The panel in the Singleton appeal held broadly that although the "ingrained practice of buying testimony" has been used by federal prosecutors for decades, with the acquiescence of the courts, it has been illegal all along.

This has set off quite a sputtering among criminal law experts, especially those at the Justice Department, which plans to appeal. "Nobody ever took this argument seriously before," says one official. If the experts are right, the panel's decision will eventually be overturned, either by the full 12-judge 10th Circuit or by the Supreme Court.

But it will have been a salutary exercise nonetheless. Debate over this decision will shine new light into one of the darkest corners of the law, the ethically dicey dealings that begin with threats of hard time and end with vulnerable witnesses saying what prosecutors want to hear.

"If this is an occasion for taking a jaundiced look at the quality and veracity of informant testimony, that wouldn't be half-bad," says Lawrence Robbins, a former federal prosecutor and assistant solicitor general who's

now with the D.C. office of Mayer, Brown & Platt. "Particularly now that the sentencing guidelines and mandatory minimum sentences have dramatically reduced the roles both of negotiation and of judicial discretion, prosecutors have the wherewithal to apply tremendous pressure on informants, many of whose pasts do not give much comfort that they would shrink from twisting the truth to achieve a better deal."

ALTHOUGH APPARENTLY unprecedented, Singleton v. United States cannot be dismissed as a case of some crazy judge going off on a weird toot or straining for a pretext to invalidate an especially smelly deal. This was a routine deal. And it was found illegal, unanimously, by appointees of three different presidents: Chief Judge Stephanie Seymour, a Carter appointee whose name has appeared on lists of possible candidates for the Supreme Court; Judge David Ebel, a Reagan appointee who once clerked for Justice Byron White; and Judge Paul Kelly Jr., a Bush appointee.

Judge Kelly's lengthy opinion for the panel begins with Supreme Court precedents mandating strict judicial enforcement of the "plain language" of statutes, even when the results do not seem to be what Congress had in mind when it passed them. By its terms, he says, this statute applies to everyone, including prosecutors. That makes perfect sense because "if justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so." And a promise of leniency to a person facing prison time clearly has great "value," and thus presents at least "as great a threat to a witness's truthfulness as a cash payment."

Even prosecutors who seek only the truth, Judge Kelly notes, may unwittingly subject witnesses to "the temptation, even if unconscious, . . . to color or falsify [their] testimony" to please their paymasters.

The panel ruled that the exemptions from criminal laws that courts have recognized for law enforcement agents in the field – such as undercover agents who participate in drug deals – are not available to prosecutors presenting evidence in court. The judges also took a narrow view of laws authorizing prosecutors to seek leniency for plea-bargaining defendants who provide them with "substantial assistance" by fingering others:

A defendant can substantially assist an investigation or prosecution in myriad ways other than by testifying. Nor will our holding drastically alter the government's present practices. The government may still make deals with accomplices for their assistance other than testimony, and it may still put accomplices on the stand; it simply may not attach any promise, offer, or gift to their testimony.

Critics stress that, whatever the internal logic of the Singleton opinion, it will come as a great surprise to Congress, which never hinted in the legislative history of the bribery-gratuity statutes that it meant to ban leniency-for-testimony deals.

"When something is so ingrained in practice, and nobody's ever dreamed that the statute prohibits it, then I think it's safe to say that the statute doesn't prohibit it," says Andrew Frey, who was once the Justice Department's top criminal law expert and is now with the New York City office of Mayer, Brown & Platt.

NOR WOULD abolishing leniency-for-testimony deals be good policy, says Frey: "Certainly the Sammy Gravanos of the world" – informants against violent organized crime groups – "are not going to testify unless you have some pretty powerful inducements."

Frey adds that payments to witnesses by interested private parties are "inherently suspect in a way that's not true when it's a prosecutor. That's not to say that prosecutors don't overreach. Some do."

The established safeguard against such overreaching is to require disclosure of prosecutors' deals with witnesses, opening the way for defense lawyers to discredit the witnesses as paid liars. Does this level the playing field? Wachtel thinks not: "Here in Kansas, any time the United States government wraps the flag around a reformed sinner and says, 'We believe him,' the jury believes him – no matter how well I cross-examine him."

Be that as it may, Professor Kate Stith of Yale Law School faults the Singleton decision as an exercise in futility, on the ground that prosecutors could find ample avenues to circumvent its ban on explicit leniency-for-testimony deals. "If the court's concern is that prosecutors are running around and getting witnesses to testify falsely – which I don't think is happening – this is not going to stop it," she says.

True. But while the Singleton rule would neither paralyze prosecutors nor purify them, it would reduce their leverage over plea-bargaining witnesses.

Under current practice, a prosecutor can wait until witnesses have finished testifying and then decide unilaterally whether they have performed well enough to earn their rewards. Under Singleton, the only proper recourse for a prosecutor dissatisfied with a witness's testimony would be to bring a perjury prosecution and try to convince a jury that the witness had deliberately lied.

The Singleton rule would thus offset somewhat the large increase in prosecutorial power that Congress has engineered over the past 15 years by shifting to prosecutors much of the authority that judges once had to determine the sentences of both plea-bargaining witnesses and convicted defendants.

Would that be a bad thing? Perhaps so, when the witness is a Sammy Gravano. But what about a small-time drug courier? Or a financial fraud artist, like Susan McDougal? Or – asks Val Wachtel – a Monica Lewinsky? Should witness-suspects like these be subject (as they are now) to the same pressures that prosecutors may need to squeeze truthful testimony from Mafiosi?

AS THE GOVERNMENT'S appeals unfold in the Singleton case, such long-festering questions should get some overdue judicial and public attention. If so, we will have a court-appointed counsel from Wichita to thank for it, along with three federal judges who dared to attack the way things have always been done.

Did they really think they could outlaw decades of prosecutorial practice without getting shot down on appeal? I doubt it. But if and when they do get shot down, it will not have been a mere judicial kamikaze

mission. It will have been a judicial bank shot – and a daring one at that.

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NEWS

Rewarding criminals for testimony against cohorts illegal, ruling says Decision by appeals court could affect cases of McVeigh, Nichols

Victoria Loe Hicks
Staff Writer of The Dallas Morning News

In the staid and often arcane world of federal jurisprudence, it was like tossing a live skunk into a junior-high classroom.

Three Denver appeals court judges ruled earlier this month that prosecutors break the law when they promise to go easy on one crook in return for his testimony against his accomplices.

The decision by the 10th U.S. Circuit Court of Appeals handed a weapon to the criminals whose cases it is weighing – including Oklahoma City bombing conspirators Timothy McVeigh and Terry Nichols.

The edict also stripped prosecutors of a favorite tool and threatened to swamp federal dockets with cases that previously would have been resolved through plea bargains.

The effect, said University of Colorado law professor Mimi Wesson, would be "something between a serious disruption and total upheaval" in the federal courts. Re-imagining justice without plea bargains, she said, would be like trying to re-imagine medicine without antibiotics.

Reaction to the ruling was vociferous. Some Denver prosecutors threatened to drop pending cases, and several Colorado congressmen vowed to rewrite the statute in question.

"It's a stunner," Denver legal analyst Andrew Cohen said of the judges' action. "It has such enormous application that I don't think it can stand."

The full 10th Circuit may share his view. On Friday, the court suspended the ruling until November, when all 12 judges will weigh the issue.

Because the judges' decision rested solely on a federal statute and not on the Constitution, it has no force in state courts. For that reason, one consequence could be the diversion of many cases from federal courts into state courts, said Ms. Wesson, a former federal prosecutor.

The ruling arose from a drug case. The defendant, Sonya Singleton, was convicted after prosecutors made a deal with one of her confederates: If he testified, they would report his cooperation to the judge who would sentence him.

That is precisely the type of agreement that bombing prosecutors struck with Michael Fortier, who testified against Mr. McVeigh and Mr. Nichols. In May, after prosecutors lauded his cooperation, a judge sentenced Mr. Fortier to 12 years, about half the maximum he might have gotten.

However, the Singleton case differs from the bombing trials in one important respect: During her trial, Ms. Singleton's lawyers tried, unsuccessfully, to suppress her

co-defendant's testimony on the grounds that the plea bargain was illegal.

Later, before the appeals court, they raised the issue again. This time, they found a receptive audience. The three judges ruled that Ms. Singleton should receive a new trial – one that does not include the challenged testimony.

At issue is a 1962 law that says: "Whoever . . . gives, offers or promises anything of value to any person, for or because of the testimony . . . to be given by such a person" has committed a federal crime.

The law is used to prosecute defendants who have tried to buy off potential witnesses against them. No other court has interpreted it to apply to prosecutors.

But the 10th Circuit judges said that a lighter sentence is clearly "a thing of value" to a person who is facing prison. And they said it is no more acceptable for prosecutors to swap inducements for testimony than it is for defendants.

"The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money," they wrote.

Two of the three judges who issued the Singleton ruling are also on the three-judge panel that is considering Mr. McVeigh's appeal.

Mr. McVeigh's lawyers did not make an issue of Mr. Fortier's plea bargain, either at trial, in their written appellate brief or during oral arguments in April.

Mr. Nichols, too, will be appealing to the 10th Circuit. His lawyers have not yet filed their appellate brief. This month's ruling will allow them to include Mr. Fortier's plea bargain among the issues they raise.

In any case, few analysts expect the ruling to stand. Either the full appeals court will reverse it, the Supreme Court will overturn it, or Congress will rewrite the law, they said.

"I think that Congress, in an election year, will decide that it's a bad idea to let criminals out of prison," Mr. Cohen said.

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COURT SLAMS TESTIMONY-FOR-LENIENCY DEALS

Patrick A Tuite, Ronald D Menaker

It is becoming increasingly prevalent in both the state and federal systems for prosecutors to cut deals with those either charged with or suspected of committing crimes with the defendant. The prosecutor's objective in such a case is clear: to secure the testimony at trial of that person against the defendant, who, the government believes, is the most culpable.

It is getting to be an almost everyday occurrence that such witnesses are promised everything from a total dismissal of charges to a more comfortable place of confinement in exchange for their testimony. The rationale behind this process, the prosecution inevitably argues, is that such deals are necessary to ensure that justice is truly served.

Very recently, however, the 10th U.S. Circuit Court of Appeals reexamined this now common practice. In U.S. v. Singleton, No. 97-3178 (July 1), the appeals court suppressed the testimony of an accomplice witness who was promised leniency in exchange for his testimony against the defendant.

The court held that the statute that prohibits the giving, offering or promising anything of value to a witness for or because of his testimony, 18 U.S.C. 201(c)(2),

outlaws such governmental conduct. This stunning opinion is long overdue and is must reading for all criminal practitioners.

In April 1992, the Wichita, Kan., Police Department was investigating a complex drug conspiracy operating between California and Kansas. The operation was launched by several men who recruited Wichita women to wire proceeds of drug sales back to California to pay for more cocaine. Some of these women also received wire transfers on behalf of the conspiracy and transported cocaine from California to Wichita.

Sonya Evette Singleton was identified as one who transferred and received money for the conspiracy, and her case was the subject of the 10th Circuit's ruling.

Singleton and several others were charged with multiple counts of money laundering and conspiracy to distribute cocaine. Before trial, she moved to suppress the testimony of one Napoleon Douglas, a co-conspirator who had entered into a plea agreement with the government.

The basis of her motion was that the government violated section 201(c)(2) by impermissibly promising Douglas leniency in return for his trial testimony. According to Douglas, the government had executed a plea agreement with him that promised the government would not prosecute him on any other drug-related conduct, to advise the sentencing court of the nature and extent of his cooperation, and to advise local authorities of his cooperation in exchange for his "truthful" testimony against the other alleged conspirators.

The district judge denied the motion, ruling that section 201(c)(2) did not apply to the government. Singleton was ultimately convicted of one count of conspiracy to distribute cocaine and seven counts of money laundering. She was sentenced to a total of 46 months in prison.

On appeal, she claimed that the trial court erred by denying her motion to suppress based on her reading of section 201(c)(2).

That provision states, "Whoever . . . directly or indirectly gives, offers or promises anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . shall be fined or imprisoned for not more than two years or both."

In essence, the statute requires three elements: (1) a gift, offer or promise of (2) anything of value (3) made "for or because of" the person's trial testimony.

The first issue confronting the court was whether a U.S. attorney, acting on behalf of the government, is included within the class of people covered by this section. In this regard, the appeals court noted that section 201(c)(2) indicates Congress' belief that justice is undermined by giving, offering or promising anything of value for testimony. If justice is perverted when a defendant seeks to buy testimony from a witness, the court reasoned, it is no less perverted when the government does so.

Moreover, because section 201(c)(2) addresses what Congress perceives to be a wrong and operates to prevent

a fraud upon the federal courts in the form of inherently unreliable testimony, the proscription of the statute applies to federal prosecutors who make promises for or because of testimony on behalf of the government, the 10th Circuit declared.

The court then examined whether the promises the government made were "anything of value." It declined to accept the government's argument that the phrase "anything of value" must be restricted to things of monetary, commercial, objective, actual or tangible value. Rather, the court emphasized, the word "value" embodies notions of worth, utility and importance, and the true test is whether the recipient attaches value to the thing received.

Since the obvious purpose of section 201(c)(2) is to keep testimony free from all influence so as to protect its truthfulness, the promise of intangible benefits is as great a threat to a witness' truthfulness as a cash payment. Therefore, the court said, there is no basis in law or common sense to limit "anything of value" to things reducible to monetary or tangible value.

The 10th Circuit thus concluded that the promises of leniency the government made to Douglas were certainly considered to be of great value. Clearly, Douglas objectively valued them since he bargained for them in return for his testimony, the court noted.

The final hurdle in determining whether the promises made in this case violated section 201(c)(2) was whether they were made "for or because of" Douglas' trial testimony. The court quickly noted that this language does not require a quid pro quo relation between

the testimony and the promise. All that it requires is that the promises be motivated by the testimony, even though the testimony might have been given without the promises.

As such, the court concluded that the record in Singleton indicates that the testimony and the promises mutually induced one another, a relation stronger than the "for or because of" required by section 201(c)(2).

Having covered every statutory element, the court found that government's conduct fell within the plain language and meaning of the statute. The only appropriate remedy, the court said, is to suppress Douglas' testimony.

This decision could have major implications for the appeal of Timothy McVeigh, who was convicted in the Oklahoma City bombing case. That is because two of the judges who participated in this ruling have been assigned to his appeal and the government's main witness against McVeigh, Michael Fortier, cut a deal with prosecutors in exchange for his testimony. This very issue is sure to arise during the course of that appeal.

It will be interesting to see how long this ruling survives in light of this problem. Criminal Law By Patrick A. Tuite and Ronald D. Menaker Tuite (left) and Menaker, partners at Arnstein & Lehr in Chicago, concentrate in criminal defense.

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Saturday, July 11, 1998

Ruling On Plea Deals Put on Hold

Scott Sandlin Journal Staff Writer

The 10th U.S. Circuit Court of Appeals, apparently mindful of the impact of last week's ruling regarding plea deals for witness testimony, put it on hold Friday until all 12 judges can rehear the case.

The decision in a Kansas criminal case, U.S. v. Singleton, said prosecutors who use promises of leniency or "anything of value" to obtain testimony are violating the federal bribery statute.

That law sets a prison term up to two years for anyone who "directly or indirectly gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation to be given by such as a witness (at) trial."

Appeals Court Judge Paul J. Kelly of Santa Fe wrote the opinion. He was joined by Chief Judge Stephanie K. Seymour and Judge David Ebel. It is binding only on states in the 10th Circuit – New Mexico, Kansas, Utah, Wyoming, Colorado and Oklahoma – but its effect could be far-reaching.

Prosecutors and defense attorneys who practice in federal court have said the decision will have a sweeping impact on criminal prosecutions because it virtually outlaws plea agreements.

The U.S. Department of Justice announced Thursday that it would ask for a review by all 12 judges, but the order filed with the 10th Circuit clerk's office in Denver on Friday afternoon was on the court's own motion.

The court set the rehearing for its fall calendar, Nov. 16-20, in Denver. It also ordered written legal arguments on whether the ruling might have future or past applications – questions that weren't addressed in the 16-page, single-spaced July 1 opinion.

U.S. Attorney John J. Kelly, who said Thursday that the ruling could affect hundreds of defendants in New Mexico cases, was traveling Friday and not available for comment.

But First Assistant U.S. Attorney Bob Gorence said, "this is what the department wanted. It thought such a momentous issue should be heard by the whole court. We're glad that's what they decided."

Federal Public Defender Ann Steinmetz was philosophical.

"To use a biblical reference, as the court did in the Singleton case, 'The Lord giveth and the Lord taketh away,' " she said.

Steinmetz said even with the ruling on hold pending review, the case will influence ongoing cases because defendants are unlikely to enter into plea agreements without knowing the outcome of the full Appeals Court decision.

"I guess it's going to be a slow summer," she said.

In the case at issue, federal prosecutors entered into a plea agreement with a co-defendant to testify against Sonya Singleton on drug charges. In exchange, the government promised not to prosecute the co-defendant for any other violations of federal drug laws arising from the investigation and to advise the sentencing judge and a parole board in another state of his cooperation.

Prosecutors argued that cases under the federal bribery statute had involved monetary payments, but the appellate panel said various courts had interpreted the phrase "anything of value" to include a variety of intangibles.

"The obvious purpose of the government's promised actions was to reduce his jail time, and it is difficult to imagine anything more valuable than personal freedom," the opinion said.

Prosecutors also argued in Singleton that the bribery statute was not meant to apply to them in these circumstances.

But the Appeals Court panel noted, "One of the oldest principles of our legal heritage is that the king is subject to the law. King John was taught this principle at Runnymede."

The opinion also said that if justice is perverted when a criminal tries to buy witness testimony, "it is no less perverted when the government does so."

Denver Post
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Friday, July 10, 1998

News

U.S. Justice Dept. to appeal ruling on witness leniency

Michael J. Sniffen The Associated Press

WASHINGTON – Worried that a bombshell court ruling in Denver could undermine prosecutions nationwide, the Justice Department will appeal a decision that bars prosecutors from promising leniency to witnesses who testify for the government in criminal trials.

"If the decision is read very, very broadly . . . it could have a very wide-ranging impact," Deputy Attorney General Eric Holder said Thursday. "It goes to the way in which prosecutors at the federal, state (and) local levels have conducted themselves for a good number of years."

Prosecutors routinely work their way up the chain of command in a criminal organization, offering immunity or reduced-charge plea bargains to lower-level participants in return for testimony against superiors. 'Buying testimony'.

Holder said the government would ask all 12 judges of the 10th U.S. Circuit Court of Appeals in Denver to rehear the case and overturn last week's unanimous ruling by three judges of that circuit.

The three appellate judges ruled that the government's practice of promising leniency to criminal witnesses is illegal because it amounts to buying testimony.

"We respectfully feel that the opinion is wrong," Holder told a news conference.

"I hope that it's not the public perception that what the government is doing is buying testimony by striking deals with the people who testify on behalf of the government. Any responsible prosecutor always tries to substantiate that which any witness for the government is going to be saying, and especially . . . in instances where the testimony is elicited after some kind of a deal is struck." May affect McVeigh appeal.

At this stage, the ruling is binding only in the 10th Circuit, which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. But Holder said Justice is asking its prosecutors across the nation to report any defense motions based on it.

The decision could affect the appeal of Oklahoma City bomber Timothy McVeigh because the government's star witness, Michael Fortier, testified after cutting a deal with prosecutors. Two of the judges who made the ruling – Circuit Judges Paul Kelly and David Ebel – are assigned to McVeigh's case. A decision on McVeigh's appeal is expected this summer.

McVeigh is awaiting execution for the April 19, 1995, bombing of a federal building in Oklahoma City that killed 168 people. Holder declined to predict the ruling's impact on the McVeigh appeal.

The leniency ruling came in the case of a Wichita woman convicted of cocaine trafficking largely on the testimony of another person, Napoleon Douglas, who said he conspired with her.

The government did not specifically tell Douglas that it would seek a reduced sentence for him, but promised it wouldn't prosecute him for other offenses and would tell both the sentencing judge and his parole board about his cooperation, the court said.

"The obvious purpose of the government's promised actions was to reduce his jail time, and it is difficult to imagine anything more valuable than personal physical freedom," Kelly said.

Anyone who directly or indirectly "gives, offers or promises anything of value to any person for or because of testimony" is subject to up to two years in federal prison and fines, Kelly said.

"The government may still make deals with accomplices for their assistance other than testimony, and it may still put accomplices on the stand," he said. "It simply may not attach any promise, offer or gift to their testimony."

Buffalo News
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Friday, July 17, 1998

VIEWPOINTS

PLEA-BARGAIN RULING STUNS PROSECUTORS

Carl Rowan – North America Syndicate

"That guy's guilty as sin, and I'm gonna lock him up any way I can!"

The nation's prosecutors have been saying that about an assortment of people for 40 years. And they have made prosecution and sentencing deals – and cut plea bargains – with lesser offenders to get the testimony needed to convict bigger targets of criminal behavior.

In an era of intense fear of crime, the people and the politicians have applauded the business of effectively paying the gnats and fruit flies of the crime world as a way of netting the big bumblebees of the drug trade, the crime syndicates, the money launderers, the securities cheats and those perpetrating frauds in health care and other areas.

The prosecutor technique of rewarding little wrongdoers for helping to bring down larger ones was seen as especially justifiable in a time when a "soft on crime" Supreme Court had allegedly given criminals an advantage over cops, and allowed slick lawyers to use Miranda rules and technicalities to protect those who were prejudged "guilty as sin."

Never mind that this procedure often involved a presumption of guilt regarding the prosecutor's target

and often encouraged the "little" wrongdoer to exaggerate and even perjure himself in making false claims against the target. Judges and others went along with the game, pretending that all was well, since defense attorneys had the right to cross-examine those giving testimony against their superiors. Presumably, some argued, not many innocent people were victimized.

Well, now a three-judge panel of the 10th U.S. Circuit Court of Appeals in Denver has ruled that it violates federal law when a prosecutor or the government promises a person leniency, such as a failure to prosecute or a reduced sentence, in exchange for testimony against someone else.

Circuit Judge Paul J. Kelly Jr. wrote: "It is difficult to imagine anything more valuable than personal physical freedom." Thus, he said, these leniency deals violate a federal law decreeing imprisonment for anyone who directly or indirectly "gives, offers or promises anything of value to any person for or because of testimony."

Prosecutors are screaming that in passing that law, Congress surely did not mean to include the government. But it clearly did not exempt the government or its prosecutors.

What's wrong with these judges taking an honest look at "assumed practices" and concluding that we have let fear of crime inure us to some tactics that are in conflict with basic justice?

There is something fundamentally wrong with a prosecutor deciding in advance that someone is guilty of

something horrible or is a menace to society, then rewarding other crooks and criminals in order to "prove" the prejudged person guilty. People start out saying that it's tolerable if you're talking about drug dealers or members of the Mafia or guys who bilk old women or pimps. But the next thing you know, some prosecutors are prejudging black males or Mexicans to be menaces who must be locked up no matter how they get them convicted.

I wonder if the judges in Denver took a harder look at such prosecutors' assumptions because special prosecutor Ken Starr has said, in effect, that Bill and Hillary Clinton are guilty as sin and he's going to lock them up no matter what he has to do? Starr has not only tried to cut immunity and leniency deals to get the testimony he needs to incriminate the Clintons, but he also has punished severely those who have refused to accept leniency and say what he wants to hear.

The lesson may be that prosecutors can get away with "buying" testimony against drug traffickers or members of a crime syndicate, but they get a powerful backlash when they mess with witnesses while attempting to "get" a popular president of the United States.

Some critics think the Supreme Court will quickly overrule the 10th Circuit. I think Judge Kelly and his colleagues are right, and I hope someone appeals, so when the high court lets the judgment stand, it will apply to the whole nation.

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Monday, July 20, 1998

STUNNING RULINGS CURTAIL PROSECUTORS' POWER

TESTIMONY CAN'T BE BOUGHT; IMMUNITY'S SCOPE WIDENED.

Marcia Coyle and David E. Rovella
National Law Journal Staff Reporters

FEDERAL PROSECUTORS operating under the long-held belief that they can make deals with witnesses and use documents produced under immunity grants suffered at least short-term disillusionment because of two federal court rulings.

The decisions – one by an appellate panel, the other by a district judge – involve different protections for witnesses and defendants in criminal cases. But experts say both seek to resolve long-simmering tensions in the law.

"Absolutely ludicrous," an evidence expert says of the 10th U.S. Circuit Court of Appeals panel decision finding illegal a prosecutor's promise of leniency in exchange for a witness' testimony. That ruling may affect the fate of Oklahoma City Bombing defendants Timothy J. McVeigh and Terry L. Nichols, both of whom were convicted in the 10th Circuit, partly on the testimony of accomplice Michael Fortier.

"Almost nobody does what this [district] judge did," says another evidence scholar about U.S. District Judge James Robertson's ruling dismissing all tax-related charges against Webster Hubbell. The judge chastised Independent Counsel Kenneth W. Starr for engaging in a "quintessential fishing expedition" despite a pre-existing immunity grant to Mr. Hubbell.

Even if both decisions fall on appeal, they may clarify two critical problems: one created by the U.S. Supreme Court and the other – addressed by the 10th Circuit in U.S. v. Singleton, 97-3178 – an issue few people were aware of, though it has been lurking in the wording of a federal statute for the past 36 years.

Testimony Can't Be Bought

The 10th Circuit's decision, filed July 1, dealt a stunning blow to prosecutors in six states by limiting their ability to make plea deals with criminal accomplices in exchange for testimony. Such dealmaking has been a mainstay of the criminal justice system at both the state and federal levels, where the vast majority of prosecutions end in plea bargains.

Jubilant defense lawyers claimed vindication after years of complaints about such arrangements. "The court has ended decades of government-sanctioned bribery," says Denver's Larry Pozner, president-elect of the National Association of Criminal Defense Lawyers. "A system in which the government could exchange freedom for a story they wanted to hear is a system rampant with injustice."

Writing for the unanimous panel – consisting of one Reagan, one Bush and one Clinton appointee – Judge Paul J. Kelly Jr. relied on 18 U.S.C. 201(c)(2), which bars the offer or promise of "anything of value" to anyone in exchange for sworn testimony.

In the underlying case, Sonya E. Singleton was convicted of money laundering and conspiracy to distribute cocaine and was sentenced to four years in prison. Before trial, Ms. Singleton's appointed attorney, John V. Wachtel, of Wichita, Kan.'s Klenda, Mitchell, Austerman & Zuercher L.L.C., had moved unsuccessfully to suppress the testimony of an accomplice, to whom prosecutors had promised leniency in exchange for testimony against Ms. Singleton.

Prosecutors argued that the statute did not cover the exchange with the accomplice for three reasons: It had traditionally been interpreted to apply only to monetary payments; witness credibility can be sufficiently challenged during cross-examination; and the defendant's interpretation of the law conflicted with other federal statutes.

But Judge Kelly, invoking the plain-meaning doctrine of statutory interpretation, said that the law means exactly what it says and that it applies to the government and individuals equally. "If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so," he wrote.

The judge also argued that his interpretation can coexist with federal sentencing guidelines, which allow

prosecutors to move for a reduced sentence for defendants who provide "substantial assistance" to the government. "The government may still make deals with accomplices for their assistance other than testimony," wrote Judge Kelly.

The government July 9 decided to seek review from the full court and asked that the panel's ruling be held in abeyance.

The judges "raised an issue that has been long overdue for resolution by the Supreme Court," says criminal procedure scholar Stephen Saltzburg, of George Washington University National Law Center. "A number of judges have said they feel the tension between language in confession cases – which say statements induced from defendants by threats, promises and leniency render those statements involuntary – and their rulings that not all offers of leniency make statements involuntary," he says. "The fact we've gone a long time with courts repeating the language of the confession cases and then permitting inducements without ever explaining why they're okay led the 10th Circuit to say, 'Okay, we're going to apply the law.' "

But, he adds, there is a commonsense distinction between threats that hurt defendants but benefit the state and promises of leniency that are good for both. As a practical matter, he says, the panel's ruling hurts both the state and suspects. "The case is very likely to end up in the Supreme Court, which will say, I think, that, notwithstanding language used over time, accurate statements to suspects about the benefits of cooperation are okay."

Two of the Singleton panel members, David M. Ebel and Judge Kelly, also sit on the appellate panel currently reviewing Timothy McVeigh's case. The convicted terrorist's lawyers are considering supplementing their brief to the 10th Circuit panel with a request that it consider the Singleton ruling and order a new trial.

A lawyer involved in the bombing case, who requested anonymity, says that because the 10th Circuit based its ruling on statutory – rather than constitutional – grounds Singleton's usefulness may be limited to only those defendants not yet sentenced. And other defense lawyers may hesitate to support the opinion even if it stands: While many of their clients are convicted because of such plea deals, Singleton could also unravel deals made by clients who flipped on fellow defendants.

Promises, Promises

Just as promises of leniency are standard prosecutorial tools, so, too, was Independent Counsel Starr's use of Webster Hubbell's tax records, says Prof. Robert P. Mosteller, of Duke University School of Law, whose law review article on immunity was cited in the Hubbell ruling.

Other lawyers, however, say Mr. Starr overstepped.

Mr. Starr conceded to the court that he built his tax-evasion case against Mr. Hubbell using 13,120 pages of records that Mr. Hubbell was compelled to produce under a 1996 subpoena – the original purpose of which was to investigate allegations of obstruction of justice.

Mr. Hubbell, a former partner at The Rose Law Firm, in Little Rock, Ark., initially refused to comply with the subpoena, invoking his Fifth Amendment privilege against self-incrimination. He relented after a court order that compelled production of the documents also granted him "immunity to the extent allowed by law."

Mr. Hubbell's attorney, John W. Nields Jr., a partner at D.C.'s Howrey & Simon, moved to dismiss the tax charges on grounds that Mr. Starr's use of the documents violated Mr. Hubbell's immunity.

Judge Robertson, a Clinton appointee, agreed. The judge rejected Mr. Starr's argument that the immunity only covered the fact that Mr. Hubbell had turned over the documents, and prosecutors, therefore, could use the documents' contents as long as the jury or fact-finder was never told that Mr. Hubbell was the source of the papers. U.S. v. Hubbell, 98-0151.

Judge Robertson explained that the Fifth Amendment is implicated by the compelled production of unprivileged documents only when one or more "testimonial" aspects of the act of production are themselves incriminating. By producing the documents, the person is "testifying" that the documents exist, the person possessed them and the documents are authentic.

Even if one or more of these aspects is present, the judge said, the privilege against self-incrimination only attaches if the government learns some new knowledge. In the Hubbell case, the compelled production of documents did just that: Mr. Starr made no claim that he knew any of the facts relevant to the tax charges when he issued the subpoena.

"Mr. Hubbell was thereby turned into the primary informant against himself," Judge Robertson wrote, concluding that Mr. Starr's use of the information violated Mr. Hubbell's Fifth Amendment rights.

The federal use immunity statute, the judge wrote, is intended to leave the witness and prosecution in substantially the same positions as they would be if the witness had taken the Fifth.

The issue Judge Robertson faced here has been around since the Supreme Court ruling in Fisher v. U.S., 425 U.S. 391 (1976), created a distinction between immunity for the act of producing documents and the lack of immunity for the use of the documents' contents.

Prosecutors rely on that distinction all the time – but Mr. Starr's problem usually doesn't arise because many subpoenas go to corporate or other organizations with no Fifth Amendment privilege. The dilemma comes from the intersection of the immunized act of production and the right against self-incrimination.

"This is an area of . . . immunity that regular everyday [federal prosecutors] are very careful about," says E. Lawrence Barcella Jr., a partner at Paul, Hastings, Janofsky & Walker L.L.P., who spent 16 years in the Washington, D.C., U.S. attorney's office before entering private practice. "You're looking for exactly the right case to push certain areas of the law . . . and this was not a good fact pattern. The weakness is the breadth of the subpoena."

But one evidence scholar says there is "a lot of logic" in the government's position that, because only the act of

production is immunized, the government can use the contents as long as it doesn't introduce into evidence the fact that the papers came from the defendant.

"But while that is logical, it is not very satisfactory," says Prof. Kenneth J. Melilli, of the Albany Law School, Union University, whose law review article also was cited in the judge's decision.

"The law has always been that immunity has to be as broad as the privilege," he says. "The person who produces the documents is in a far worse position here. I suspect that is at the heart of the judge's decision."

Staff Reporter Harvey Berkman contributed to this article.

Saturday, July 25, 1998

Prosecutors Seek Testimony Deals

SANDY SHORE

DENVER (AP) – A court ruling barring federal prosecutors from offering leniency to witnesses for their testimony will stymie efforts to nail drug kingpins, mob bosses and bombers like Timothy McVeigh, prosecutors said.

In a brief filed Friday, federal prosecutor Sean Connelly asked the 10th U.S. Circuit Court of Appeals to permanently reject an earlier decision that deemed such agreements illegal because prosecutors were, in effect, buying testimony.

"The United States relies on witnesses who testify in return for leniency in literally thousands of cases each year, including major cases such as the Oklahoma City bombing prosecutions," Connelly wrote in the 28-page brief.

McVeigh was convicted and sentenced to death for the 1995 bombing that killed 168 people and injured hundreds of others. Prosecutors relied on one of McVeigh's former friends, Michael Fortier, who was given a promise of leniency for his testimony.

Prosecutors routinely offer immunity or reduced-charge plea agreements to defendants who testify against co-defendants.

"Without such testimony, the government could not enforce the drug laws, could not prosecute organized crime figures . . . (and) many other cases," Connelly said.

On July 1, a three-judge panel of the appeals court ruled that the practice violated a federal law – a decision that sent shockwaves through the nation's courthouses and caught the immediate attention of the Justice Department.

While the order was binding only in the 10th Circuit – which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming – the Justice Department vowed to appeal the decision, saying it could be cited to undermine prosecutions elsewhere.

The ruling was put on hold pending the review by all 12 of the circuit court judges. Oral arguments aren't expected until November.

The controversial ruling came in the case of a Wichita, Kan., woman convicted of cocaine trafficking largely on the testimony of another person, Napoleon Douglas, who said he conspired with her.

The government did not specifically tell Douglas that it would seek a reduced sentence for him, but promised it wouldn't prosecute him for other offenses and would tell both the sentencing judge and his parole board about his cooperation, the court said.

The panel said such deals fall under a federal law against offering a witness "anything of value" in return for testimony.

Stunning Rulings Curtail Prosecutors' Power

Testimony can't be bought; immunity's scope widened.

By Marcia Coyle
and David E. Rovella

NATIONAL LAW JOURNAL STAFF REPORTERS

The National Law Journal (p. A01)
Monday, July 20, 1998

FEDERAL PROSECUTORS OPERATING UNDER THE long-held belief that they can make deals with witnesses and use documents produced under immunity grants suffered at least short-term disillusionment because of two federal court rulings.

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No. 98-234

(3)

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1997

JUAN GARCIA-ABREGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ A Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

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41 pp

SUPPLEMENTAL AUTHORITY

Additional authority has become available regarding Petitioner's argument in the Petition for Writ of Certiorari. This issue, which has recently come under considerable scrutiny by legal and lay journals alike is ripe for determination by this Court. Petitioner attaches as the appendix, the opinions which have issued and are available to counsel. The following cases cited are unobtainable:

U.S. v. Smith, No. 98-3172 (6th Cir. 1998);
U.S. v. Ward, No. ___ (6th Cir. 1998);
U.S. v. Morris, No.'s 97-6089, 97-6199, 97-6200 (6th Cir. 1998); and
U.S. v. Turnley, No. ___ (6th Cir. 1998).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-368-CR-ZLOCH

UNITED STATES OF AMERICA,
Plaintiff,
vs.

OSLET FRANKLIN LOWERY, JR.,
Defendant.

THIS MATTER is before the Court upon the Defendant, Oslet Franklin Lowery, Jr.'s Motion To Suppress (DE 134). The Court has carefully reviewed said Motion and is otherwise fully advised in the premises.

In the instant Motion (DE 134), the Defendant has moved to suppress the anticipated testimony of his three co-Defendants, Guillermo Mallarino, Jose Ignacio Forero and Danny Morino, as the plea agreements in this matter secured such testimony in violation of Title 18, United States Code, Section 201(c)(2). On July 21, 1998, the Assistant United States Attorney and counsel for Defendant Lowery presented oral argument to this Court as to the aforementioned Motion.

Upon careful consideration of the instant Motion and of argument of counsel, the Court, for the reasons set forth below, finds that the plea agreements of the aforementioned co-Defendants in this matter violate the clear and unambiguous meaning of Section 201(c)(2). Accordingly, the Court finds that the testimony of each of said co-Defendants should be suppressed.

I. INTRODUCTION

The Court notes that the Government of the United States consists of three separate, but equal, branches: the Executive Branch, the Legislative Branch and the Judicial Branch. The actions complained of herein by Defendant Lowery were performed by the Executive Branch, acting through its Department of Justice. Therefore, for the sake of clarity, throughout this Order, such actions will be noted as those of the Executive Branch.

The Defendants, Oslet Franklin Lowery, Jr., Guillermo Mallarino, Jose Ignacio Forero and Danny Morino, were charged in a four-count Indictment with conspiracy to import cocaine, conspiracy to possess cocaine with intent to distribute it, importation of cocaine and possession of cocaine with intent to distribute it. Prior to the trial of the above-styled cause, Defendants Mallarino, Forero and Morino entered into cooperation plea agreements with the Executive Branch (DE Nos. 55, 58 and 65). Each agreement contemplated the substantial assistance, including but not limited to truthful testimony, of each respective Defendant. In exchange, the Executive Branch agreed "to evaluate the nature and extent of [each] Defendant's cooperation and to make [such] Defendant's cooperation, or lack thereof, known to the court at the time of sentencing" (DE 55 at 5; DE 58 at 5; DE 65 at 6). In addition, the Executive Branch agreed that if the Defendant's cooperation was of substantial assistance in the investigation and prosecution of criminal matters, the Executive Branch "may" make a motion pursuant to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the United States Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure. Sections 3553(e) and 5K1.1 and Rule

35 enable a sentencing court, upon motion of the Executive Branch, to depart downward from or reduce the otherwise applicable guideline sentence.

In the instant Motion (DE 134), Defendant Lowery asserts that the testimony of co-Defendants Mallarino, Forero and Morino should be suppressed as the aforementioned promises by the Executive Branch, which are contingent upon each co-Defendant's cooperation, and more precisely, testimony, violate Title 18, United States Code, Section 201(c)(2). In support of his position, Defendant Lowery cites the recent decision by the United States Court of Appeals for the Tenth Circuit, *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). In *Singleton*, the Tenth Circuit concluded that the district court erred in denying the defendant's motion to suppress a witness' testimony where the Executive Branch, in return for such testimony, promised something of value to the witness, including advising the sentencing court of the nature and extent of the witness' cooperation. Specifically, the court determined that the Executive Branch's promises violated the plain language of Section 201(c)(2). On July 10, 1998, the Tenth Circuit vacated the *Singleton* opinion and granted a rehearing en banc. Although *Singleton* is no longer of precedential value, the Defendant adopts in its entirety the reasoning of the *Singleton* court.

Conversely, it is the Executive Branch's position that the *Singleton* case was wrongly decided and that this Court should follow the precedent of the United States Court of Appeals for the Eleventh Circuit interpreting Section 201(c)(2). In particular, the Executive Branch asserts that first, Section 201(c)(2) does not apply to the Executive Branch; second, the Eleventh Circuit's decision in *Golden*

Door Jewelry v. Lloyds Underwriters, 117 F.3d 1328 (11th Cir. 1997), has already decided the issue before this Court; third, the more specific provisions of the substantial assistance statutes should prevail over the more general Section 201(c)(2); fourth, it is a settled practice of the Executive Branch to engage in this type of agreement; and fifth, the aforementioned agreements do not violate the Florida Bar Rules of Professional Conduct. Noticeably absent from the Executive Branch's argument, however, is any recognition that the plain language of Section 201(c)(2) should control this Court's inquiry.

II. STATUTORY INTERPRETATION

In addressing the merits of the instant Motion (DE 134) as well as the Executive Branch's objections, the Court's initial task is to explore the pertinent rules of statutory construction. It is a basic tenet of statutory construction that "courts in applying criminal laws generally must follow the pain [sic] and unambiguous meaning of the statutory language." *Salinas v. United States*, 118 S.Ct. 469, 474 (1997). Thus, the starting point for interpreting a statute is naturally the "language of the statute itself." *Consumer Product Safety Com. v. GTE Sylvania, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") (internal citations omitted). As a general rule of statutory construction, where the terms of a statute are unambiguous, and where the "statutory scheme is coherent and consistent," judicial inquiry is complete. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Indeed, courts must presume that, when enacting a statute, the legislature says what it means and means what it says; for it is a fundamental principle that " . . . Congress legislates with knowledge of [the] basic rules of statutory construction . . . " *McNary v. Haitian Refugee Center*, 498 U.S. 479, 495 (1991). Having ascertained the plain meaning of a statute, it then becomes the sole function of the judiciary "to enforce [the statute] according to its terms." *Ron Pair Enterprises, Inc.*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

As the Supreme Court recognized in *Deal v. United States*, 508 U.S. 129, 132 (1993), the meaning of a word cannot be determined in isolation. Thus, courts must draw from the language itself, the specific context of such language and the broader context of the entire statute. *Robinson v. Shell Oil Company*, 117 S.Ct. 843, 846 (1997). Further, terms which are not defined within a statute "are given their ordinary or natural meaning." *National Coal Association v. Chater*, 81 F.3d 1077, 1081 (11th Cir. 1996) (citation omitted).

Although the legislative history of a statute is of some relevance, courts should "not resort to legislative history to cloud a statutory text that is clear." *Id.* at 1082 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994)). Nor may an appeal to statutory purpose overcome the specific language of a statute, because the text is the most persuasive evidence of legislative intent. *Chater*, 81 F.3d at 1082; *Griffin*, 458 U.S. at 571.

Indeed, the plain language approach to a statute is essentially a rational approach. As the interpretive partners of Congress, the courts have a responsibility to review the

text of a statute with a common-sense degree of precision in an effort to ascertain the meaning of a statute. This common-sense reliance upon the plain statutory language also helps courts avoid the danger of mistakenly substituting their will for that of the legislature. For as United States Supreme Court Justice Antonin Scalia correctly and succinctly stated in his concurrence in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987): "Judges interpret law rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

It is, however, a familiar rule of statutory construction that when a literal reading of a statutory term would produce an absurd result or one at odds with the whole statute, courts must look for other evidence of legislative intent in order to give the words their proper scope. *Rector, Etc. of Holy Trinity Church v. United States*, 143 U.S. 143 U.S. 457, 459 (1892); *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989).

Guided by these principles of statutory construction, the Court will now examine the plain meaning of Section 201(c)(2).

III. TITLE 18, UNITED STATES CODE, SECTION 201(c)(2)

Title 18, United States Code, Section 201(c)(2) provides as follows:

> (c) Whoever –
>
> (2) directly or indirectly, gives, offers or promises anything of value to any person,

> for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, . . .

shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2). In addressing the merits of the instant Motion, as well as the substantial concerns of the Executive Branch, the Court will analyze each separate word or phrase as necessary.

First, Section 201(c)(2) applies to "whoever." The term "whoever" means "no matter who." (The American Heritage Dictionary 1380 (2d ed.1985). It is the Executive Branch's position that it simply does not fall within this seemingly unlimited statutory class. In *Nardone v. United States*, 302 U.S. 379, 383 (1937), the United States Supreme Court recognized a limited rule of statutory construction which provides that a statute does not apply to the Government, in this case, the Executive Branch, or affect its rights unless the text clearly and indisputably includes the Executive Branch. This canon, however, operates to exclude the Executive Branch only in two types of cases. In the first instance, the Executive Branch is excluded where a statute "if not so limited, would deprive the [Executive Branch] of a recognized or established prerogative title or interest." *Id.* Nevertheless, where the law operates upon the agents or servants of the Executive Branch, rather than on the Executive Branch, itself, this rule of exclusion of the Executive Branch is "less stringently applied." *Id.* Thus, where there is no evidence of a contrary legislative purpose, legislation, worded in general terms, is construed to apply to all persons, including

public officers and agents. *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 374 (N.Y. 1953) (citing *Nardone v. United States*, 302 U.S. 379 (1937); *United States v. State of Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935); and *Dollar Sav. Bank v. United States*, 86 U.S. 227 (1873)).

Even assuming that the Executive Branch has a recognized or established interest in securing the cooperation of defendants, the Executive Branch cannot establish that Section 201(c)(2) operates on the *Executive Branch*, as opposed to individual federal officers. While the Executive Branch correctly asserts that the Department of Justice acts on behalf of the Executive Branch, it is the actions solely of the agents of the Executive Branch which are at issue. That is, Section 201(c)(2) impacts only upon the method of investigation and prosecution chosen by the agents of the Executive Branch in representing its interests. Because alternative methods, which comply with Section 201(c)(2), remain available to such agents, the Executive Branch's overall interest in securing cooperation of defendants, or in otherwise fighting crime, will not be impeded. Therefore, Section 201(c)(2) in no way operates upon the Executive Branch itself.

Moreover, there is no evidence of any legislative purpose which would release the Executive Branch from the general terms of Section 201(c)(2). Indeed, a careful reading of Section 201(c) as a whole easily dispels any notion that Congress intended to exclude the Executive Branch from Section 201(c)(2). In sharp contrast to Section 201(c)(2), Section 201(c)(1) expressly exempts the Executive Branch from its operation. Section 201(c)(1) applies to the same general class of "whoever," but then provides one important limitation: "otherwise than as provided by law for

the proper discharge of official duty. . . . " 18 U.S.C. § 201(c)(1). This limitation is conspicuously absent from Section 201(c)(2). It is well understood that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 118 S.Ct. 285, 290 (1997) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation omitted)). Because Congress clearly exempted the Executive Branch from application of Section 201(c)(1), this Court must assume that Congress knew how to do the same in Section 201(c)(2), but intentionally chose not to do so. Given Congress' intentional omission of an official duty exemption, it is not this Court's function to insert or insinuate such an exemption.

In the second instance where *Nardone* would exclude the Executive Branch from operation of the statute, public officers are excluded where "a reading which would include such officers would work obvious absurdity." *Nardone*, 302 U.S. at 383. In this matter, however, inclusion of the Executive Branch and its agents hardly works an obvious absurdity. It is elementary that testimony obtained through inducement is inherently unreliable. Nor is there any dispute that Section 201(c)(2) clearly prohibits a defendant from promising or giving a thing of value in exchange for a witness' testimony. It is axiomatic, therefore, that if the judicial process is tainted by the admission of unreliable testimony induced by a defendant's promises, it is no less tainted by the identical actions of the prosecutor.

While the Court's finding herein may preclude the Executive Branch from securing testimony in a certain manner, it clearly does not preclude it from obtaining cooperation from an individual or from consequently rewarding such individual. Nor does it prohibit a witness from testifying at trial or other court proceedings, either on his own initiative or under compulsion. With this ruling, the Court simply recognizes that the dangers of permitting officers of the Executive Branch to engage in bargaining for testimony are as substantial as when a defendant does the same. Where a witness, either for the Executive Branch or the defense, knows that a promise of leniency or other thing of value is inextricably intertwined with his testimony, the incentive to lie and to curry favor is tremendous. Thus, application of Section 201(c)(2) to all persons, including the prosecution, would not work an obvious absurdity, but would clearly preserve the integrity of the judicial process.

It follows then, that Section 201(c)(2) undoubtedly is intended to prevent an injury or a wrong; specifically, the perversion of the judicial process. Thus, *Nardone* instructs that the Executive Branch is included in the terms of Section 201(c)(2). *Nardone*, 302 U.S. at 384.

Moreover, the Constitutional form of Government which has guided this country for over two-hundred and twenty years demands that the Executive Branch be subject to the laws enacted by the United States Congress. At last glance, the United States was a democracy – not a monarchy. Thus, neither the United States Attorney, the Department of Justice nor the Executive Branch is above the law, but is subject to it in the same manner and to the same degree as an ordinary citizen. That is, the Executive

Branch may not pick and choose which laws it will follow and which it will disregard. Accordingly, the Court finds that the Executive Branch and its agents are unquestionably subject to the provisions of Section 201(c)(2).

Second, there is no doubt that the Executive Branch is giving, offering or promising a "thing of value" to the co-Defendants in this matter. The term "thing of value" has been broadly construed to envelop both tangibles and intangibles. *See United States v. Marmolejo, Jr.*, 89 F.3d 1185, 1192 (5th Cir. 1996) (citing *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992)). Thus, a "thing of value" has been interpreted to include amusement, information and sexual intercourse. *Id.* Further, the focus is not upon an item's actual value, but upon what value a defendant subjectively attaches to the items received. *United States v. Williams*, 705 F.2d 603, 622-23 (2nd Cir. 1983).

In each of the plea agreements before this Court, the Executive Branch promised to advise the sentencing Court of the nature and extent of the Defendant's cooperation. In addition, the Executive Branch promised that it "may" file a motion for downward departure or reduction in sentence if it finds the Defendant's assistance to be substantial. It is difficult to imagine something of greater subjective value to a defendant facing incarceration than the promise of a lesser sentence. Therefore, the Court finds that the promises made by the Executive Branch to the co-Defendants clearly involve a "thing of value."

Third, the Court must find that each "thing of value" was given, offered or promised "for or because of" each co-Defendant's testimony. Under the "for or because of"

requirement, the gift, offer or promise and the testimony need not motivate each other, there is no quid pro quo. *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 966 (D.C. Cir. 1998) (construing "for or because of" language in Section 201(c)(1)). Rather, "[t]he relation may be simply one of reward. . . . for an act taken in the past or to be taken in the future." *Id.* Therefore, "a gift looking to future acts can be [unlawful] where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts." *Id.*

Each of the plea agreements in this matter indicates that the respective promises of leniency were made "for or because of" each co-Defendant's testimony. In other words, the promise of the Executive Branch to evaluate and advise the Court of each co-Defendant's cooperation, including testimony, as well as the potential for a substantial assistance motion, were rewards for such co-Defendant's actions in the past and in the future. Further, each plea agreement was executed prior to the trial of the remaining Defendant, Oslet Franklin Lowery. Obviously, the Executive Branch was motivated to offer such promises to the co-Defendants in order to increase the likelihood that each would testify at trial. Therefore, the Court finds that the plea agreements in the instant case easily satisfy the "for or because of" requirement.

The Court is mindful of the Executive Branch's argument that a plain language approach to Section 201(c)(2) produces an absurd result. Such an argument is, however, without merit. Rather, including the Executive Branch and its leniency agreements within the reaches of Section 201(c)(2) ensures that the judicial process will remain untainted by the admission of purchased testimony.

Indeed, allowing the Executive Branch to buy testimony would produce the absurd result of the Executive Branch being subject to one set of rules while the defense is subject to another. Certainly, if testimony purchased by a defendant is tainted, testimony purchased by the Executive Branch is no less tainted. The most logical construction of Section 201(c)(2), therefore, is one that prohibits *all* agreements for testimony, irrespective of who enters into them.

The Executive Branch further argues that prohibiting all agreements for testimony has the "absurd result" of compromising past and ongoing criminal prosecutions. The Court, then, must look for other evidence of legislative intent in order to give the terms of Section 201(c)(2) their proper scope. Upon reviewing Section 201 as a whole, as well as its legislative history, it is clear that, despite the impact upon criminal prosecutions, this Court has correctly interpreted the plain language of Section 201(c)(2).

Congress enacted the predecessor to Section 201(c)(2) in order to prohibit giving or receiving a thing of value "by . . . witnesses 'for' or 'because of'. . . . " H.R. Rep. No. 87-748, at 19 (1961) (discussing 18 U.S.C. § 201(h)). Such exchanges for testimony were recognized by Congress as having "the appearance of evil and the capacity as serving as a cover for evil." *Id.* at 19. No distinction was made, however, between exchanges involving the Executive Branch and a witness and those involving a defendant and a witness. Rather, Congress made the prohibition applicable to "whoever," including the Executive Branch. *Cf.* 18 U.S.C. § 201(c)(1). Thus, from its original enactment, *all* agreements for testimony violated Section 201(c)(2), whether made by the Executive Branch

or the defense. The fact that the courts, the Executive Branch and the defense have not applied Section 201(c)(2) to the Executive Branch is, therefore, wholly irrelevant to this Court's inquiry.

While criminal prosecutions might be impacted by this Court's ruling, this, in and of itself, is certainly not a reason for the Court to disregard the plain words of the Statute. Indeed, focusing solely on the current effects of a plain meaning interpretation of Section 201(c)(2) impermissibly obscures Congress' clear intent of prohibiting the evil of purchased testimony. Moreover, it is simply not the judiciary's place to rewrite Congressional intent simply because the plain meaning of a statute, ignored for fifty years, suddenly has profound implications.

In addition, to the extent that one may argue that this Court's interpretation of Section 201(c)(2) is at odds with the legislative scheme of the Statute, this argument is easily dismissed. Section 201(c)(1) expressly excludes the Executive Branch from its reach. Section 201(c)(2) does not. Therefore, reading both Sections together leads to the obvious conclusion that Congress intended one Section to include the Executive Branch and the other to exempt the Executive Branch. Why Congress chose to differentiate between these two Sections is not for this Court to surmise. That Congress explicitly did so, however, is a clear indication that this Court has given the terms in Section 201(c)(2) their proper scope.

Further, Section 201(d) provides an exception for payment of witness fees. 18 U.S.C. § 201(d). It is evident that because Congress made an explicit exception for such payments, under the plain language of Section 201(c)(2),

such payments would otherwise have been prohibited. Therefore, this Court's broad interpretation of the term "thing of value" is consistent with Section 201, as a whole.

In light of the foregoing, the Court finds that the Executive Branch is clearly subject to Section 201(c)(2) and that the Executive Branch's promises to the co-Defendants in this matter violate the plain language of Section 201(c)(2).

IV. ELEVENTH CIRCUIT PRECEDENT

Relying upon the Eleventh Circuit's decision in *Golden Door Jewelry v. Lloyds Underwriters*, 117 F.3d 1328 (11th Cir. 1997), the Executive Branch insists that the plea agreements in this matter conform with Section 201(c)(2) because each agreement explicitly prohibits false testimony. In *Golden Door*, it was argued that a payment to a witness violated Section 201(c)(2), even though such payment was not in exchange for *false* testimony. *Id.* at 1335 n. 2. (emphasis supplied). Relying upon its previous decision in *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992), a panel of the Eleventh Circuit summarily rejected this argument.

A careful review of both *Golden Door* and *Moody*, however, leads this Court to conclude, most respectfully, that *Golden Door* applied the *Moody* holding out of context. In *Moody*, a different panel of the Eleventh Circuit was faced with resolving overbreadth and vagueness challenges to Section 201(c)(2). The defendant had bribed a witness to testify in his favor and had promised more money if she had to testify again. In concluding that Section 201(c)(2) was not overly broad, the court held that the defendant's

conduct was "clearly within the statute's 'legitimate sweep.' " *Id.* at 1424. Further rejecting the defendant's vagueness challenge, the court stated that Section 201(c)(2) "obviously proscribes a bride [sic] for false testimony; persons of ordinary intelligence would come to no other conclusion." At no point, however, did the *Moody* court intimate that Section 201(c)(2) applied *only* to false testimony.

Notwithstanding the limited reach of the *Moody* holding, the panel in *Golden Door* cited *Moody* for the broad proposition that Section 201(c)(2) is violated only when false testimony is involved. The Court notes that where there are conflicting decisions between two panels of the same court, the earlier decision is presumptively correct. *See Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984); *see also, Kent v. Baker*, 815 F.2d 1395, 1400 n.3 (11th Cir. 1987). Thus, to the extent that the *Golden Door* holding conflicts with *Moody*, the earlier decision rendered in *Moody* is presumptively correct and should be followed in its entirety. Therefore, consistent with *Moody*, the Court finds that under the plain language of Section 201(c)(2), Section 201(c)(2) applies to all testimony, whether false or truthful.

V. SECTION 201(c)(2) IN RELATION TO OTHER STATUTES

The Executive Branch further argues that statutes enacted subsequent to Section 201(c)(2) limit or invalidate the operation of this Section. In particular, the Executive Branch points to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the United States Sentencing

Guidelines and Rule 35 of the Federal Rules of Criminal Procedure. These statutes, referred to as the substantial assistance provisions, allow the Executive Branch to seek a downward departure or reduction in sentence based upon a defendant's substantial assistance in the investigation or prosecution of criminal matters. Because these statutes include assistance in the prosecution of a case, the Executive Branch asserts that it is not restricted by Section 201(c)(2) from making promises in exchange for testimony.

The Court is unpersuaded by this argument. It is a well-settled rule of statutory construction that a specific, narrowly drawn statute takes precedence over a more generally applicable statute. *Simpson v. United States*, 435 U.S. 6, 15 (1978); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 158 (1976). While Sections 3553(e) and 5K1.1 and Rule 35 contemplate the more general "substantial assistance," which may includes [sic] testimony, Section 201(c)(2) applies solely to testimony. Thus, Section 201(c)(2) takes precedence over the subsequent, more general substantial assistance provisions.

Further, where it appears that two statutes clash in whole or in part, it is the province of this Court "so far as [it] can by any fair construction" to reconcile the statutes to each other. *The Federalist No. 78*, at 396 (Alexander Hamilton) (Garry Wills ed., 1982). Thus, so long as two statutes are not positively repugnant, the Court must give effect to both. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (citations omitted).

This Court is not convinced that Section 201(c)(2) and the substantial assistance provisions are in conflict, but

believes they may be reconciled in the following way. The Court recognizes that there are numerous ways in which a defendant may offer substantial assistance both in the investigation and prosecution of a case. Testifying at trial or other proceedings is just one means by which a defendant may "substantially assist" in a case. While Section 201(c)(2) explicitly prohibits giving, offering or promising a thing of value for or because of testimony, it does not preclude a reward for all other forms of substantial assistance. Nor does it preclude a witness from testifying at trial. Thus, Section 201(c)(2) and the substantial assistance provisions may be read together to allow substantial assistance motions as rewards for all types of cooperation, excluding testimony.

VI. POLICY CONSIDERATIONS

As previously noted, at no time during the oral argument on this matter did the Executive Branch base its case upon the plain language of Section 201(c)(2). Instead, the Executive Branch argued that policy considerations should somehow contravene the express language chosen by Congress in Section 201(c)(2). Specifically, the Executive Branch noted that a plain reading of Section 201(c)(2) would upset the Executive Branch's settled practice of offering a reduced sentence in exchange for testimony. The Court agrees that the implications of a plain meaning interpretation of Section 201(c)(2) are serious for both the Executive Branch and the defense. Nevertheless, this factor does not excuse the Court from performing its duty of proper statutory interpretation.

It is simply not this Court's Constitutional function to assume the role of a policymaker or legislator by altering the plain meaning of the statute. Such a function lies solely with the Legislative Branch which is elected by and accountable to the people. As the Supreme Court has correctly recognized, "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute. [The Court] may not." *Griffin*, 458 U.S. at 576 (citations omitted).

Indeed, this is the precise issue which concerned Alexander Hamilton when he wrote:

> The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

The Federalist No. 78 at 396 (Alexander Hamilton) (Garry Wills ed., 1982). Thus, "when a [judge] follows his personal policy predilections he is engaged in something other than the practice of constitutional law. To a very real extent, therefore, a Court that refrains from indulging int he [sic] formulation and implementation of policy is essential to the maintenance of constitutional government." Eugene W. Hickok, Jr., *On Federalism*, III Benchmark 229, 238 (1987). It is imperative, therefore, that judges "identify, respect, and maintain appropriate limits on judicial power. . . . " Lillian R. BeVier, *Judicial Restraint: An Argument From Institutional Design*, 17 Harvard Journal of Law & Public Policy 7 (1994). Only by adhering to this philosophy will courts "govern according to the rule of law rather than whims of politics and

personal preference." ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION of the LAW* 318 (1990).

With these points in mind, the Court takes issue with those courts which advocate policy considerations over the plain text of Section 201(c)(2). Not surprisingly, in these days of judicial activism, there are increasing numbers of judges who either ignore the law created by the Legislative Branch or behave as though the Legislative Branch and the Judicial Branch are one. These activist judges simply disregard the plain and ordinary meaning of statutes and rules, eager to substitute their own "notions of good social policy." Lino A. Graglia, *Do We Have An Unwritten Constitution? – The Privileges Or Immunities Clause Of The Fourteenth Amendment*, 12 Harvard Journal of Law & Public Policy 83, 88-89 (1989).

For example, this practice is nowhere more apparent than in the growing list of "rights" which has inundated federal and state law. Judges have created from the most distant penumbras of the Constitution unprecedented rights or interests under the guise of "liberty" and "privacy." Such craftsmanship, however, is simply intellectually dishonest and has no place in the judicial system. Moreover, those judges who seek to advance their own agendas or pander to popular causes should have the intellectual honesty to resign from the Bench and run for public office.

Accordingly, the Court, mindful of its proper role within this Constitutional form of Government, declines the Executive Branch's invitation to heed policy considerations over the plain and unambiguous meaning of this

Statute. While the Court appreciates that its ruling herein upsets the Executive Branch's settled practices, the Court cannot rule otherwise: the Court is simply not authorized to usurp the legislative function properly left to the United States Congress.

VII. RULE 4-3.4(b) OF THE RULES OF PROFESSIONAL CONDUCT

Rule 4-3.4(b) of the Rules of Professional Conduct for the Florida Bar provides as follows:

> A lawyer shall not:
>
> > (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness . . .

It is the Executive Branch's position that Rule 4-3.4(b) does not proscribe offers of leniency by the Executive Branch in exchange for a witness' truthful testimony. The Court finds this argument to be without merit. First, there is nothing in Rule 4-3.4(b) which excludes the Executive Branch from its purview. Second, the Rule does not distinguish between truthful or untruthful testimony – all inducements for any testimony are forbidden. *See Golden Door Jewelry Creations, Inc.* [sic] *Lloyds Underwriters Non-Marine Association*, 865 F.Supp. 1516, 1526 (S.D. Fla. 1994). Third, a witness has a "solemn and fundamental duty to tell the truth." *Id.* Thus, any inducement offered by any party would undermine the administration of justice. Lastly, Rule 4-3.4(b) does not distinguish between inducements permissible by law and inducements prohibited by law. Thus, the Executive Branch's argument that the Supreme Court of Florida has long recognized the Executive Branch's practice of offering

leniency for testimony is of no avail in interpreting this Rule. Rather, it is apparent that all inducements, whether contrary to law or not, are precluded. Moreover, none of the Florida cases cited by the Executive Branch addressed the prohibition against inducements found in Rule 4-3.4(b).

In light of the foregoing, the Court finds that the inducements offered by the Executive Branch to each of the co-Defendants in this matter violate the prohibition set forth in Rule 4-3.4(b) of the Rules of Professional Conduct.

The Court adds that even if this Court were to find that there was no violation of Rule 4-3.4(b), such a finding would not assist the Executive Branch. The fact remains that the Executive Branch would still be in violation of Section 201(c)(2).

VIII. REMEDY

In the instant Motion (DE 134), Defendant Lowery moves this Court to suppress the anticipated testimony of co-Defendants Mallarino, Forero and Morino. In response thereto, the Executive Branch contends that suppression is inappropriate as Section 201(c)(2) provides only for a possible fine and/or imprisonment for violations thereof. Accordingly, the additional remedy of suppression should not be grafted onto the statute.

In support of its argument, the Executive Branch cites *United States v. Thompson*, 936 F.2d 1249, 1251-52 (11th Cir. 1991), wherein the Eleventh Circuit concluded that where "Congress specifically designates a remedy for one of its acts," courts should not read the exclusionary rule into

the statute. Further, the court noted that implementing a "judicially imposed exclusionary remedy" would be disproportionate to the infraction in that case. *Id.* at 1252.

Ordinarily, courts should not create a remedy where Congress has already provided one. Nevertheless, the Court recognizes that, in this instance, strict adherence to this principle would result in there being no enforceable remedy. That is, the Court, as a member of the Judicial Branch, cannot order the Executive Branch to investigate, prosecute and punish itself for a violation of this Section. To do so would infringe upon the exclusive province of the Executive Branch – to execute the laws of this country. However, "[f]ederal courts sit to enforce federal law." *United States v. Chemaly*, 741 F.2d 1346, 1354 n. 2 (11th Cir. 1984). Therefore, there must be some means by which the Court may compel obedience to Section 201(c)(2). Accordingly, the Court is left to fashion an appropriate judicial remedy. *See United States v. Calandra*, 414 U.S. 338, 347-48 (1974).

Upon careful review of this matter, the Court finds that suppression of the co-Defendants' testimony is the appropriate remedy for the Executive Branch's violation of Section 201(c)(2) and to "deter future unlawful [prosecutorial] conduct." *United States v. Calandra*, 414 U.S. 338, 352 (1974). By the Executive Branch's own admission, making promises in exchange for testimony is a long-standing and pervasive practice in criminal prosecution. This Court cannot conceive a more effective means of deterring the Executive Branch from entering into prohibited leniency agreements than to exclude the very fruits of its efforts. Further, exclusion of the co-Defendants' testimony will eliminate any incentive on the part of the

Executive Branch to defy Section 201(c)(2). *Elkins v. United States*, 364 U.S. 206, 217 (1960). By suppressing the ill-gotten testimony, the Court removes the sole motivation for the Executive Branch to disregard Section 201(c)(2), and compels respect for those Congressional enactments designed to preserve the integrity of the judicial system.

The Court is constrained to note that the lack of a stated remedy against the Executive Branch in no way abrogates this Court's finding that the Executive Branch is subject to Section 201(c)(2). Section 201(c)(2) very clearly encompasses official misconduct, for which the appropriate and established remedy is suppression. *See United States v. Russell*, 411 U.S. 423, 430 (1973). Therefore, it was unnecessary for the explicit remedy of suppression to be spelled out in the Statute.

In addition, the Court is mindful that the Federal Rules of Evidence impose upon the judiciary an affirmative responsibility to act as a "gatekeeper" in allowing relevant testimony and evidence before a jury. *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 583 (1993). Specifically, Rule 104(a) requires the Court to determine "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." Fed. R. Evid. 104(a). Further, Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Therefore, in order to preserve the integrity of the adversarial system, the Court is required to reject testimony or evidence which is so inherently unreliable that its admission would create a danger of unfair prejudice or mislead the jury. *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

For example, a trial judge has the discretion to exclude a hearsay statement or a known perjurious statement under Rule 403 where the statement is so unreliable that its probative value is "substantially outweighed by the danger of prejudice and confusion." *See e.g., Precision Piping and Instruments, Inc. v. E. I. du Pont de Nemours and Company*, 951 F.2d 613, 620 (4th Cir. 1991). This same reasoning applies with no less force to the instant matter.

In this case, the Executive Branch has, quite simply, purchased the testimony of the co-Defendants through promises of leniency. Each co-Defendant, therefore, has every reason to fabricate, falsify or exaggerate his testimony in an attempt to curry favor with the Executive Branch. That the respective plea agreements prohibit false testimony is of no assistance, as a defendant may fashion his testimony in such a way that it will not be false, but nor will it be truthful.

Purchased testimony is inherently unreliable and will only serve to taint and obscure the entire judicial process. Further, the Executive Branch has no protected interest in presenting such testimony at trial. Because the dangers of unfair prejudice and confusion to the jury substantially outweigh the Executive Branch's interest in presenting

the testimony, the testimony is properly excluded. Therefore, the Court finds that the anticipated testimony of the co-Defendants in this matter should be suppressed.

IX. CONCLUSION

The Court's finding herein, although lengthy, may be reduced to one simple principle: it is not this Court's Constitutional function to engage in legislation. By invoking the theory that "settled expectations" demand exclusion of the Executive Branch from the reaches of Section 201(c)(2), the Executive Branch requests that this Court usurp the function properly left to the United States Congress. Moreover, the Executive Branch's theory amounts to nothing more than this: it has always been done this way, so it must be right. Such reasoning has never been the proper basis for a legal ruling and this Court refuses to make it the basis for one now.

Further, if, as the Executive Branch asserts, Section 201(c)(2) obviously excludes the Executive Branch, the Court feels compelled to question the need for legislation, hurriedly introduced in the wake of *Singleton* on July 15, 1998, to amend the Statute. *See* S. 2314, 105th Cong. (1998). By such action, Congress has reinforced the conclusion that Section 201(c)(2) presently includes the Executive Branch.

Finally, the Court notes that the testimony of cooperating witnesses and cooperating defendants is a valuable resource for law enforcement in the investigation and successful prosecution of criminal activity. Any exclusion, however, of the Executive Branch from Section 201(c)(2)

must come from the Legislative Branch, and not the Judicial Branch. A judge's authority has limits and outside those limits or designated areas, the democratic institutions govern. Thus, if any changes are to be made to Section 201(c)(2), or if more appropriate, the substantial assistance provisions, it is solely for Congress, and not for the courts or the Executive Branch, to make them.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that the Defendant, Oslet Franklin Lowery, Jr.'s Motion To Suppress (DE 134) be and the same is hereby GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of August, 1998.

/s/ WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

David Cora, Esq., AUSA
Adalberto Jordan, Esq., AUSA

Philip Horowitz, Esq.
For Defendant Lowery

UNITED STATES of America

v.

Fernando FRAGUELA

No. CRIM.A. 96-0339.

United States District Court,
E.D. Louisiana.

Aug. 27, 1998.

ORDER & REASONS

BERRIGAN, District J.

The matter is before the Court on motion for new trial by defendant Fernando Fraguela.

Citing the 10th Circuit decision of *United States v. Singleton*, 144 F.3d 1343, Fraguela contends the testimony of several of the pivotal witnesses against him was procured in violation of 18 U.S.C. 201(c)(2). The Court agrees and GRANTS the motion for new trial.

The Court adopts as much of its rationale the original panel decision in Singleton as well as Judge Zloch's district court decision in *United States v. Lowery*, 1998 WL 493818 (S.D.Fla.), which is attached hereto [attachment omitted in printing]. The Court is aware that the Singleton panel decision has been vacated. The Court is also aware of the following district court decisions that have declined to follow Singleton: *United States v. Guillaume*, 1998 WL 462199 (S.D.Fla.); *United States v. Reid*, 1998 WL 481459 (E.D.Va.) and *United States v. Arana*, 1998 WL 420673 (E.D.Mich.).

The following additional reasons led to this Court's decision.

Most persuasive is the clear, plain language of the statute itself. A district court is to apply statutory law as expressed when the language is unambiguous. 201(c)(2) is clear and unambiguous. None of the arguments made by the government challenge, nor could it challenge, the fact that the language of the statute itself is clear and inclusive. When a statute is clear, is it inappropriate for a court to look behind it or around it or read into it meanings and intent that are not expressed.

Secondly, applying this statute to the government does not in fact lead to absurd results, as argued by the government. On the contrary, it would lead to greater reliability in our judicial system. The statute prohibits virtually all inducements that could be offered a person in exchange for testimony. All such inducements have the inherent tendency to encourage tainted testimony and to induce a witness to shade the testimony in a manner pleasing to the inducer. As Judge Zloch stated in the *Lowery* case, "Where a witness, either for (the government) or the defense, knows that a promise of leniency or other thing of value is inextricably intertwined with its testimony, the incentive to lie and curry favor is tremendous. Thus, application of Section 201(c)(2) to all persons, including the prosecution, would not work an obvious absurdity, but would clearly preserve the integrity of the judicial process." 1998 WL 493818.

A theme of the government's argument is that somehow when the government offers the inducement, it will get "truthful" testimony. Government inducements do not guarantee truthfulness any more than the private inducements would that are unquestionably prohibited

by the statute. Regardless of the good faith of the individual prosecutor, any inducement is as much, if not more, a temptation to fabricate than it is to tell the truth. In terms of the inducement itself, it is frankly difficult to envision a more powerful incentive to shade testimony a particular way than avoiding a criminal conviction or avoiding loss of freedom. It is a reality that when the prosecution tells a cooperating witness he must 'tell the truth' it is the same prosecution that determines what the 'truth' is, regardless of the good faith of the prosecutor. This is obvious to the cooperating witness. Consequently, if the cooperating witness' testimony is not consistent with what the prosecution perceives the truth to be, there is no leniency. This does not appear to be conducive to encouraging untainted 'truthful' testimony.

Related to the above, applying 201(c)(2) to the government also improves the integrity of the judicial system by leveling the playing field. As already mentioned, the government has powerful prosecutorial tools in its arsenal; tools that are unavailable to the defense. These include the power to call persons before a grand jury; to send out FBI agents with the authority of that office to interview potential witnesses; the power to grant immunity which erases a person's Fifth Amendment privilege and compels the person to testify; the power to decide who to charge with what criminal offenses; the power to indict, to dismiss and reduce charges. The defense has no such actual authority nor even the trappings of such authority to aid in the preparation of their case. In addition to that disparity, 201(c)(2) clearly applies to the defense and prohibits the defense from offering any inducement to a witness at all, except routine travel

expenses or costs. To find 201(c)(2) inapplicable to the prosecution, just gives the prosecution yet another powerful weapon that is not shared by the defense for no, frankly, logical reason. This is inequitable and to disallow it leads to sound, not absurd, results.

Lastly, this Court is not persuaded by the argument that the government prosecution will be crippled if 201(c)(2) applies to them. In federal court, district judges are statutorily prohibited from participating in plea agreement discussions. Nevertheless, defendants commonly plead guilty, not knowing what the sentence will be, and being expressly told that anything their attorney or someone else has told them regarding the sentence is not binding on the judge. Undoubtedly defendants plead guilty hoping to earn downward points in the guideline calculation for acceptance of responsibility and hoping for a bottom of the guideline or below guideline sentence, but they have not been promised such an outcome. Likewise, here, witnesses faced with criminal charges even without outright promises of leniency from the government will undoubtedly still cooperate, encouraged by the practical reality and hope for some sort of benefit if they do. The government's efforts will not be crippled, and the integrity of the entire process will be enhanced.

Consequently, for all the above reasons, this Court concludes that 18 U.S.C. 201(c)(2) does and should apply to government plea bargaining. In this case, it is undisputed that pivotal testimony against the defendant was acquired through that process. This Court concludes the appropriate remedy is a new trial.

UNITED STATES OF AMERICA v. JOHN EISENHARDT

Crim. No. S 95-0468, Civil No. S 98-2521

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

1998 U.S. Dist. LEXIS 11663

July 30, 1998, Opinion Filed

DISPOSITION: Motion for Relief pursuant to *28 U.S.C. section 2255* SUMMARILY DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings.

COUNSEL: Lynne A. Battaglia, U.S. Attorney for the District of Maryland, Joseph L. Evans, Assistant U.S. Attorney, Baltimore, MD, For Government, Respondent.

Andrew Radding, Robert D. Schulte, ADELBERG, RUDOW, DORF, HENDLER & SAMETH, LLC, Baltimore, MD, For Defendant/Petitioner.

JUDGES: Frederic N. Smalkin, U.S. District Judge.

OPINION BY: Frederic N. Smalkin

OPINION: MEMORANDUM OPINION

The defendant in this criminal case has filed, by counsel, a motion for postconviction relief pursuant to *28 U.S.C. section 2255*. In that the Court's review of the motion in light of the files and records of the Court convince it beyond any question that the movant is not entitled to any relief in this Court, an order will be entered separately, summarily dismissing the motion, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings.

The defendant's first argument is that his guilty plea to the offense of conspiracy was tainted and induced by

the fact that various potential witnesses against him were co-operators in an ongoing child pornography investigation in the District of New Jersey, who had been given or promised favorable treatment by federal prosecutors in exchange for their testimony. Citing the recent panel decision of the Tenth Circuit in *United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998)*, rehearing en banc granted and panel opinion vacated, ___ *F.3d* ___, *1998 U.S. App. LEXIS 15451* (10th Cir. July 10, 1998), the defendant argues that his prosecution was tainted by violation of *18 U.S.C. section 201*, and that all evidence flowing from co-operators was poisoned by such violation, on account of prosecutorial violation of *18 U.S.C. section 201*.

The Court, first, notes that the panel opinion in Singleton has been vacated. Thus, it is no longer of any authoritative weight at all. Furthermore, it never was, in my judgment, persuasive authority. Before it was vacated, the undersigned read that opinion, and he concluded that it was amazingly unsound, not to mention nonsensical, especially in its creation ex nihilo of an exclusionary rule barring testimony from virtually every cooperating federal witness. The chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are, in this Court's judgment, about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns.

The defendant's second point is that he was denied effective assistance of counsel in the pretrial stage of the proceedings. He complains that the Maryland attorney who represented him pre-charging in New Jersey (the case having been transferred here for guilty plea to a

criminal information pursuant to Fed.R.Crim.P. 20) was not competent in the early stages of the investigation, when he allegedly gave Mr. Eisenhardt bad advice about cooperating in the investigation.

There is no Sixth Amendment concern raised by this contention. The Sixth Amendment right to counsel does not attach until the initiation of formal criminal proceedings. *Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972).* Here, there is no allegation that formal proceedings had been initiated when the allegedly bad advice was given. In fact, the present motion recites that the defendant discharged the attorney in question and retained new counsel "to represent him at trial, in lieu of which a plea agreement, by necessity and good counsel, was reached with the Government." (Motion at p.8)

Thus, in that there is no indication that there was any violation of the Sixth Amendment, and in that defendant does not claim the necessary Sixth Amendment predicates of incompetent advice and prejudice in connection with the entry of his plea of guilty to warrant relief under settled law, see *Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985),* his second contention is meritless.

Finally, the defendant claims that the Sixth Amendment was violated when his retained attorney failed to advise him to pursue certiorari relief from the Supreme Court after the Fourth Circuit affirmed on direct appeal. The Supreme Court has flatly held that no ineffective assistance claim under the Sixth Amendment is made out by a contention that counsel, retained or appointed, failed to pursue discretionary relief in the Supreme Court.

Wainwright v. Torna, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982); Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974). In that the Supreme Court's review of federal criminal cases by certiorari is a discretionary review, see *Miller v. Keeney, 882 F.2d 1428, 1432 n.6 (9th Cir. 1989),* there is simply no right to have the advice of counsel in pursuing it. Id. (This does not, of course, take into account the duties of counsel appointed for indigents pursuant to the Criminal Justice Act, who do have a duty under that Act and its implementing plan with regard to certiorari review, see *Proffitt v. United States, 549 F.2d 910 (4th Cir. 1976),* cert. denied, *429 U.S. 1076, 50 L. Ed. 2d 795, 97 S. Ct. 818 (1977),* but no such duty existed here on the part of retained counsel.)

For the stated reasons, an Order will be entered separately that summarily dismisses the present motion.

Dated: July 30, 1998

Frederic N. Smalkin

U.S. District Judge

ORDER

For the reasons stated in a Memorandum Opinion entered herein this date, it is, by the Court, this 30th day of July, 1998, ORDERED:

1. That the Motion for Relief pursuant to *28 U.S.C. section 2255* filed herein BE, and it hereby IS, SUMMARILY DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings; and

2. That the Clerk mail copies hereof to counsel for the defendant and to the United States Attorney for this District.

Frederic N. Smalkin

U.S. District Judge

UNITED STATES OF AMERICA, Plaintiff, vs. LUIS ARANA, JOSE ALBERTO REYES, LORENZO DOMINGAS, and GILBERTO FELIPE HERNANDEZ, Defendants.

No. 95-CR-80272

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1998 U.S. Dist. LEXIS 11320

July 24, 1998, Filed

DISPOSITION: Defendants' Motion to Suppress Testimony DENIED.

COUNSEL: For U.S.A.: Michael Stern/Wayne F. Pratt.

For Arana, Defendant: Richard Paul Zipser, Bloomfield Hills, MI.

For Jose Reyes, Defendant: Don Ferris, FERRIS & SALTER, Ann Arbor, MI.

For Dominguez, Defendant: Ellen Dennis, Saline, MI.

For Hernandez, Defendant: Maria Mannarino, Detroit, MI.

JUDGES: PRESENT: Honorable Gerald E. Rosen, United States District Judge.

OPINION BY: Gerald E. Rosen

OPINION: OPINION AND ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS TESTIMONY

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on JUL 24 1998

PRESENT: Honorable Gerald E. Rosen

United States District Judge

I. INTRODUCTION

The above-captioned action is presently before the Court on the Motion to Suppress Testimony filed by Defendant Gilberto Felipe Hernandez and joined in by Defendants Luis Arana, Lorenzo Domingas and Jose Alberto Reyes. The Government has responded to Defendants' Motion. The Court has reviewed and considered the parties' briefs, and having discussed Defendants' Motion with counsel at the Status Conference held on July 16, 1998, the Court is now prepared to rule on this matter. This Opinion and Order sets forth the Court's ruling.

II. FACTUAL BACKGROUND

This is a 17-defendant drug conspiracy/murder for hire action. Thirteen of the defendants named in the indictment have already been tried or have entered guilty pleas. The remaining four defendants – Luis Arana, Jose Alberto Reyes, Lorenzo Domingas and Gilberto Felipe Hernandez (collectively referred to herein as "Defendants") – are awaiting trial which is scheduled to commence on July 22, 1998 before this Court.

On July 9, 1998, Defendants filed the instant Motion to Suppress seeking to preclude the trial testimony of certain witnesses who entered into Rule 11 plea agreements with the Government, including Canelaria DeJesus, Jose Balsce, Cespedes "Angel" Campo, Pascual

Alonzo Perez, Alberto "Mickey" Solis, Roberto Perez Herrera and Leonor Espita. A number of these expected witnesses were also named defendants in the instant indictment.[1]

Defendants maintain that the United States has promised these witnesses and other prospective witnesses to move for downward departures from applicable sentencing guidelines, dismiss other charges, not to file subsequent offender notices, and/or apply on the witness's behalf to the Witness Security Program in exchange for their trial testimony in this case. The Government does not dispute that in entering into plea agreements with a number of witnesses in this case it has made such promises. Relying on *U.S. v. Singleton*, ___ F.3d ___, 1998 U.S. App. LEXIS 15451, 1998 WL 350507 (10th Cir., July 1, 1998), vacated and rehearing en banc granted, ___ F.3d ___, No. 97-3178 (10th Cir., July 10, 1998) (decision noted on WESTLAW), Defendants argue that the Government's promises amount to promises of leniency and, as such, are in violation of subsection (c)(2) of the anti-bribery statute, *18 U.S.C. § 201(c)(2)*, which prohibits the giving, offering or promising of anything of value to any person in exchange for his or her testimony. They further contend that the appropriate remedy for testimony obtained in violation of § 201(c)(2) is suppression of its use at trial.

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[1] Witnesses DeJesus, Balsce, Campo, Solis and Herrera are part of this case. They all have pled guilty pursuant to Rule 11 agreements.

DISCUSSION

A. THE STATUTE

18 U.S.C. § 201(c)(2) provides:

(c) Whoever –

* * *

(2) directly or indirectly gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, . . .

shall be fined under this title or imprisoned for not more than two years, or both.

B. THE SINGLETON DECISION

In *U.S. v. Singleton*, the defendant, Sonya Singleton, was charged with others in a superseding indictment with multiple counts of money laundering and conspiracy to distribute cocaine. Before trial, she moved to suppress the testimony of Napoleon Douglas, a co-conspirator who had entered into a plea agreement with the government. In the plea agreement, Douglas promised to testify in federal and/or state court "in consideration of" the government's promises (1) not to prosecute him for certain offenses; (3) [sic] to inform the district court of the nature and extent of the cooperation provided by Douglas prior to sentencing; and (3) to advise the Mississippi state parole board of the nature and extent of cooperation provided.

Singleton argued in her suppression motion that Douglas's testimony would be given in violation of *18 U.S.C. § 201*(c)(2) and, therefore, it should be suppressed. The district court denied Singleton's motion and the case proceeded to trial.

Upon the close of proofs, the jury convicted Singleton of one count of conspiracy to distribute cocaine and seven counts of money laundering. She was subsequently sentenced to 46 months imprisonment to be followed by three years supervised release.

Singleton appealed her convictions arguing that the district court erred in denying her motion to suppress testimony.[2] The Tenth Circuit agreed and reversed and remanded the matter for a new trial.[3]

The appellate court first found that the anti-bribery provisions of § 201(c)(2) applied to the Government through its agent, the assistant U.S. attorney who negotiated and agreed to the Rule 11 plea agreement with

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[2] She also argued that district court erred in denying her post-trial motion for judgment of acquittal which was predicated on a theory of insufficiency of the evidence.

[3] It is unclear why the appellate court remanded the case for a new trial. Although it is true that the court determined that the district court's failure to suppress Mr. Douglas's testimony was not harmless error as to either the conspiracy or the money laundering convictions, *1998 WL 350507* at * 24, it went on to find that, "excluding the testimony of Mr. Douglas and viewing the remaining evidence and all reasonable inferences from it in the light most favorable to the government . . . a rational jury could have found Ms. Singleton guilty beyond a reasonable doubt of both the conspiracy and money laundering charges." *Id.*

Napoleon Douglas. The court reasoned, "The anti-gratuity provision of Section 201(c)(2) indicates Congress's belief that justice is undermined by the giving, offering or promising anything of value for testimony. If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so." *1998 WL 350507* at *3.

The Singleton court further determined the agreement not to prosecute him for certain offenses and the promise to inform the sentencing court and the Mississippi state parole board of the nature and extent of the cooperation provided were "things of value" under the statute because "the obvious purpose of the government's promised actions was to reduce [the testifying co-defendant's] jail time, and it is difficult to imagine anything more valuable than personal physical freedom. *Id.* at * 9.

C. IN ENTERING INTO PLEA AGREEMENTS, IS THE GOVERNMENT SUBJECT TO THE SECTION 201(c)(2)'s PROHIBITION?

The Supreme Court has long recognized a canon of construction which provides that statutes which tend to restrain or diminish the powers, rights, or interests of the sovereign do not apply to the government or affect governmental rights unless the text expressly includes the government. *See United States v. Herron*, 87 U.S. 251, 256, 22 L.Ed. 275 (1873); *United States v. Nardone*, 302 U.S. 379, 383, 58 S. Ct. 275, 276, 82 L. Ed. 314 (1935). The Singleton court acknowledged this rule but determined that it only

applied to two classes of statutes, and found that Section 201(c)(2) did not fit in either class.

The "two classes" of cases which the Singleton court referred to were discussed (briefly) in *U.S. v. Nardone, supra.* The first class consists of statutes which, unless the government is exempted, would deprive the sovereign of a recognized or established prerogative title or interest. *58 S. Ct. at 277.* The classic example of a statute within this first class is the exemption of the sovereign from statutes of limitations. *Id.* The second class is comprised of those statutes which would create an absurdity if applied to the government, as, for example, a speed limit applied to a policeman pursuing a suspect. *Id.*

The Singleton court determined that Section 201(c)(2) did not fit in either of these two classes of statutes.

As an initial matter, this Court believes that the Singleton court read Nardone too narrowly. Nardone does not "limit" application of the canon to only the two classes of cases discussed. All that the Court in Nardone stated was that the canon "has been applied" to cases which fall into two classes. Nothing in that decision or any other Supreme Court decision "limits" application of the canon to only the two classes of cases mentioned.

However, even if Nardone is read to exempt the Government from coverage of a statute only when these two classes of cases are involved, this Court finds that this case fits squarely within the second class of cases – construing Section 201(c)(2) as argued by Defendants would create an absurdity if applied to federal prosecutors in their negotiation and execution of plea agreements. This "absurdity" is evidenced by the inconsistency

that would be [sic] exist between Section 201(c)(2) and the federal immunity statute, *18 U.S.C. § 6001*-6005, because sections 6001-6005 authorize federal prosecutors to give immunity from prosecution for testimony, while section 201(c)(2) criminalizes offering anything of value for testimony. The Singleton court found no inconsistency or absurdity in this because it noted that under §§ 6001-6005, "the government does not give immunity directly for the witness's testimony; the government may move the court to grant immunity," and it is the court that actually "gives" the immunity. *1998 WL 350507* at *6.

In this Court's view, this is no different than a prosecutor moving for a downward departure. The prosecutor is not "giving" anything; in the Rule 11 agreements at issue here, the Government has simply agreed to recommend reduced sentences. It is a matter for the court to decide whether or not to "give" the downward departure.[4]

That application of Section 201(c)(2) to federal prosecutors would work an "absurdity" is further demonstrated by the inconsistency that would exist between the

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[4] It appears to this Court that the Singleton court strained to find that Section 201(c)(2) did not fit within the class of cases in which application of the statute would work an absurdity. Indeed, the Singleton court actually acknowledged the "absurdity" presented between the immunity statute and Section 201(c)(2) when the latter is construed to apply to federal prosecutors but simply it chose to overlook this manifest inconsistency: "We leave for other courts 'the classic judicial task of reconciling [§§ 6001-6005 and § 201(c)(2)], and getting them to 'make sense' in combination.' " *1998 WL 350507* at *6 (citation omitted).

anti-bribery statute and the federal sentencing statutes, *18 U.S.C. § 3553*(e), and the sentencing guidelines.

18 U.S.C. § 3553(e) provides,

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

The amendments which added subsection (e) to § 3553 were adopted two months prior to the adoption of the amendments to Section 201 which resulted in the rewording and recodification of the witness bribery prohibitions in 201(c)(2). See, Pub.L. 99-570, 1986 U.S.Code & Cong. Admin. News, 5393; Pub.L. 99-646, 1986 U.S.Code & Cong. Admin. News, 6139. *28 U.S.C. § 994*(n) referenced in § 3553(e) directs the Sentencing Commission to ensure that the sentencing guidelines reflect "the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Accordingly, the sentencing guidelines provide that the Government may move for a downward departure from the guidelines if it determines that the defendant has "provided substantial assistance in the investigation or prosecution of another person who

has committed an offense . . . ", U.S.S.G. § 5K1.1, and "the appropriate reduction shall be determined by the court for reasons stated that may include the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." U.S.S.G. § 5K1.1 (a)(2) (emphasis added). See also Fed. R.Crim. Pro. 35(b) ("the court, on motion of the Government made within one year after the imposition of the sentence, may reduce the sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . ")

Clearly, Section 3553(e), Rule 35 and the sentencing Guidelines all anticipate that the Government may intercede on a defendant's behalf and request a reduced sentence in exchange for his agreement to testify on behalf of the Government in the prosecution of others. Given the fact that Section 3553 and Section 201 were amended within two months of each other, if Congress had intended Section 201(c)(2)'s prohibitions to apply to the Government in agreeing to move for reduced sentences in exchange for a cooperating defendant's testimony, it would have said so. By its silence and by its adoption of Section 3553(e), it has effectively said otherwise.

The Singleton court found no inconsistency between application of § 201(c)(2) and the above sentencing statutes, guidelines and rules simply because it noted that "each of these provisions of law authorizes only that substantial assistance can be rewarded after it is rendered; none authorizes the government to make a deal for testimony before it is given." *Id.* at *15 (emphasis added). Yet, there is absolutely nothing in Section 201(c)(2) (or any other of the anti-bribery provisions of Section 201) to

support this premise – i.e., there is nothing in the anti-bribery statute which distinguishes the criminality or non-criminality of "giving of [a] thing of value" in exchange for testimony based upon the timing of the giving.

The Singleton court then went on to attempt to harmonize section 201(c)(2) and the sentencing statutes and guidelines by concluding that "substantial assistance" as used in the sentencing statutes and guidelines must be read to not include testimony. *Id.* at *15. Nothing in the Legislative History of Section 201(c)(2) or its predecessor, *18 U.S.C. § 201*(h) supports this conclusion. Indeed, as indicated above, such a strained construction is belied by the expressly stated Sentencing Guidelines policy statement as to what constitutes "Substantial Assistance to Authorities" under U.S.S.G. 5K1.1 which explicitly includes within the meaning of the term "assistance" as used in the Guidelines, "any information or testimony provided by the defendant".

That Section 201(c)(2) should be construed not to cover federal prosecutors is further bolstered by the well-settled rule that criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. *Brogan v. United States*, ___ U.S. ___, 118 S. Ct. 805, 811 (1998). The Singleton court determined, however, that this general rule applies only in the criminal "investigatory" context, and because it found no cases in which the rule was applied to prosecutors representing the government after the initiation of criminal proceedings, it decided that this general rule was inapplicable after an [sic] defendant is indicted. Again, there is nothing in Brogan which supports drawing a line for application of

the rule at the point in time when criminal charges are first initiated.[5]

D. WERE THE PROMISES MADE BY THE GOVERNMENT "THINGS OF VALUE"?

In Singleton, the court determined that because the purpose of government's promised actions was to reduce co-defendant/witness Douglas's jail time, and because "it is difficult to imagine anything more valuable than personal freedom", the promises purportedly made by the Government were "things of value" under Section 201(c)(2). However, in making that determination, the Tenth Circuit panel glossed over what this Court believes is an important issue: who is doing the "giving, offering or promising" of the purported "things of value"?

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[5] Furthermore, Rule 11 plea bargaining can reasonably be viewed as part of the investigatory process in that the process is premised upon a debriefing of the defendant which, as noted by the Advisory Committee in its Notes regarding the 1974 amendments to Rule 11, may "contribute to the successful prosecution of other more serious offenders." Typically, Rule 11 agreements, like the agreements with the co-defendant/witnesses in this case, provide for the defendant to provide testimony at trial, in pretrial proceedings, and before the grand jury. It is well-settled that grand jury proceedings are investigatory proceedings. *See United States v. Calandra*, 414 U.S. 338, 343-44, 94 S. Ct. 613, 617-18, 38 L.Ed.2d 561 (1974) ("A grand jury proceeding is . . . an ex parte investigation. . . . "). *See also, Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S. Ct. 2646 (1972); *Blair v. United States*, 250 U.S. 273, 282, 39 S. Ct. 468, 63 L.Ed. 979 (1919).

E. WHO IS DOING THE "GIVING, OFFERING, OR PROMISING" OF THE THING OF VALUE?

In deciding the Singleton Section 201(c)(2) question, the Tenth Circuit failed to recognize that in entering into Rule 11 agreements with promises to advise the sentencing court of the defendant's cooperation, move for downward departures or recommend dismissal of certain charges, federal prosecutors really are not the parties "giving, offering or promising" personal freedom. This is precisely what was promised to the Government witnesses in this case. In the Rule 11 plea agreements entered into with the Government witnesses whose testimony is at issue, the Government promised as follows:

> Defendant has agreed to provide federal and local law enforcement authorities with assistance in the investigation and prosecution of others who are involved in criminal activities. In this regard, . . .
>
> Defendant promises to provide truthful and complete information to the United States Attorney's office and to other law enforcement agencies. This includes and requires full debriefings and truthful testimony at all proceedings, whether criminal, civil, or administrative. This further includes grand jury proceedings, pretrial proceedings, trials and posttrial proceedings. . . .
>
> * * *
>
> Upon the government's determination that Defendant's cooperation amounts to substantial assistance in the investigation of others involved in criminal activities, the government will request the court to depart downward from the applicable guideline range. . . .

If the government makes such a motion, based on Defendant's substantial assistance, the government will recommend a sentence of ___, rather than the term of imprisonment noted in section II(D) of this agreement. However, the court's failure to follow such a recommendation is not a basis for Defendant to withdraw his guilty plea or to rescind the plea agreement. . . .

The government [further] agrees that at the time of sentencing, it will move to dismiss counts ___ of the superseding indictment. . . .

[See, e.g., Plea Agreements of Cespedes "Angel" Campo, Alberto "Mickey" Solis, Jose Balsce, Candalaria DeJesus and Roberto Perez Herrera.]

Thus, it is clear that all the prosecutors have done here is agree to recommend or request that the sentencing court reduce the co-defendant/witnesses' sentences and move for dismissal of some charges. The Singleton court superficially recognized this ("Although the information [and intervention] promised by the government certainly would not guarantee Mr. Douglas's release, it was an invaluable step toward that end,") but then glossed over it focusing only on the "great value" of the government's promised information and intervention. To accept the Singleton court's premise and take it to its logical conclusion, the sentencing court which accepts a Rule 11 plea agreement and grants the Government's motion to dismiss certain charges or grants a motion for downward departure or for reduction of sentence would, by the Singleton panel's definition, be criminally liable for violating Section 201(c)(2). Of course, it would be absurd to

conclude that Congress intended federal judges to be held criminally liable for taking such actions.

This Court's conclusion that the government cannot be deemed to violate Section 201(c)(2) when it enters into a Rule 11 agreement based upon the defendant's cooperation because it does nothing more than request or recommend that the court take a certain action is supported by the Sixth Circuit's decision in *United States v. Blanton*, 700 F.2d 298 (6th Cir.) reheard in part, *719 F.2d 815 (6th Cir. 1983)*, cert. denied, 465 U.S. 1099 (1984).

Blanton involved the conviction of the former governor of Tennessee and several of his political appointees on various charges of mail fraud, Hobbs Act violations, and conspiracy. The essence of the charges was that the defendants used their positions to see that friends of Blanton would receive retail liquor licenses from the Tennessee Alcoholic Beverage Commission ("ABC"). The most critical evidence against the defendants was the videotaped deposition of Jack Ham, an immunized witness who received a liquor license during Blanton's tenure and who allegedly agreed to give Blanton a cut of the profits in violation of state law. Ham had contributed $1,000 to Blanton's campaign.

After they were convicted, the defendants moved for a new trial on a number of grounds, including "prosecutorial misconduct", contending that the government violated *18 U.S.C. § 201*(h) (the predecessor of section 201(c)(2)) by persuading ABC officials that the public interest would be served if Ham did not have to fear losing his liquor license because of his testimony. The

district court rejected the defendants' argument and the Sixth Circuit affirmed:

We find no violation of § 201(h). The purported "thing of value" – a liquor license – was not offered by the government. The ABC director believed that the public interest would be served by exposure of possible corruption in the ABC during the Blanton administration. Admittedly, the government encouraged the ABC to adopt this viewpoint. But there was no evidence that it had anything at its disposal other than the power of persuasion; there is no evidence of any coercive power on the government's part. Therefore, the offer cannot be said to have come from the government.

This is precisely the situation presented in this case. The prosecutor has nothing more than the power of persuasion to encourage the Court to be lenient in sentencing the testifying co-defendants.

For all of the foregoing reasons, this Court disagrees with the Singleton decision and declines to follow it here. Furthermore, the Government pledges that it will adhere to its obligation to disclose to the jury evidence of its plea agreements with the testifying co-defendants and other witnesses. *See United States v. Giglio*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). *See also, United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974). As in this case, the defendant in Barrett moved to suppress a witness's testimony against him arguing that the government's plea bargain promises to a witness to drop charges against him and to recommend leniency to the sentencing court in exchange for his testimony violated *18 U.S.C. § 201*(h) (the predecessor of Section 201(c)(2)). The Seventh Circuit

affirmed the trial court's denial of the motion to suppress pointing out that the only remedy to which the defendant was entitled was to admit evidence of the plea agreement and to impeach witness with it when he testified. This is the remedy to which the Defendants in this case are entitled.

CONCLUSION

For all of the reasons stated above in this Opinion and Order,

IT IS HEREBY ORDERED that Defendants' Motion to Suppress Testimony is DENIED.

Gerald E. Rosen

United States District Judge

UNITED STATES of America, Plaintiff,

v.

Luckner GUILLAUME, Defendant.

No. 97-6007-CR.

United States District Court, S.D. Florida.

Aug. 3, 1998.

MORENO

ORDER DENYING MOTION TO SUPPRESS AND EXCLUDE

THIS CAUSE came before the Court upon Defendant's Motion to Exclude the testimony of witnesses for allegedly violating the federal bribery statute, 18 U.S.C. § 201(c)(2), which prohibits offering something of value in exchange for testimony. The Court finds that Congress, in enacting that statute, clearly intended to exclude plea agreements between a defendant and a prosecutor. Therefore, the motion to exclude the accomplice testimony is denied.

ANALYSIS

Congress and the courts have long accepted the reality in criminal procedure that, where government needs will be served, immunity from prosecution may be granted to an individual in exchange for testimony regarding the crime under investigation. *See* 32 A.L.R. 4th 990 (1981). This practice permits the government to obtain testimony in order to effectuate criminal detections, investigations, and prosecutions, in circumstances where the absence of such testimony would lead to the release of criminals to the detriment of society. *See* 32 A.L.R. 4th 990 (1981). Therefore, plea agreements are

essential to the administration of justice and are to be encouraged by the courts. *See Santobello v. United States*, 404 U.S. 257, 260 (1971).

This exchange of reduced sentences or immunity for testimony presents the danger that a witness, influenced by his hope of obtaining a grant of immunity or a reduced sentence, will promise to testify to anything desired by the prosecution. *See* 32 A.L.R. 4th 990 (1981). But because deal striking is so necessary to obtaining prosecutions and enforcing the law, safeguards have been established to protect against such abuses. *See United States v. Dailey*, 759 F.2d 192, 196 (1st Cir. 1985); *United States v. Insana*, 423 F.2d 1165, 1169 (2d Cir. 1970). Courts have uniformly held that a witness may testify so long as: (1) the government's bargain with him is fully divulged so that the jury can evaluate his credibility; (2) defense counsel is permitted to cross- examine the accomplice about the agreement; and (3) the jury is specifically instructed to weight the accomplice's testimony with caution. *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987); *Dailey*, 759 F.2d at 196. These rules strike a balance between the competing interests of effective law enforcement and the need for reliable testimony in court, an [sic] manifest, the tenet that "the government cannot be expected to depend exclusively upon the virtuous in enforcing the law." *United States v. Richardson*, 764 F.2d 1514, 1521 (11th Cir. 1985).

Nevertheless, the Tenth Circuit Court of Appeals recently held that the federal bribery statue is applicable to the government. *See United States v. Singleton*, 1998 WL 350507 (10th Cir. July 1, 1998), vacated & reh'g en banc

granted, *United States v. Singleton*, No. 97-3178 (10th Cir. July 10, 1998). The federal bribery statute provides:

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years or both.

18 U.S.C. § 201(c)(2) (West 1998).

Courts have long recognized the rule that statutes do no [sic] apply to the government or affect governmental rights unless the test expressly includes the government. *See Nardone v. United States*, 302 U.S. 379, 383 (1937). This rule applies where a statute would deprive the government of "a recognized or established prerogative title or interest" or where applying the statute to the government would create an absurdity. *Id.* The *Singleton* panel found that the rule did not apply to 18 U.S.C. § 201(c)(2), instead opining that the government is included in the statutory class "whoever." *See Singleton*, 1998 WL 35057, at *5-6. This Court disagrees.[1] The application of § 201(c)(2) to

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[1] Apparently the Tenth Circuit as a whole also has reservations about the panel's extraordinary opinion, as the opinion was vacated pending an en banc rehearing. Moreover, two U.S. District Courts have published opinions rejecting the *Singleton* panel's conclusion. *See U.S. v. Arana*, 1998 WL 420673 (E.D.Mich. July 24, 1998); *U.S. v. Duncan*, 1998 WL 419503 (E.D.La. July 15, 1998).

the government deprives it of a "recognized and established prerogative interest or title," works an obvious absurdity, and threatens to hamper the effectiveness of the government in the investigation and prosecution of crime. Therefore, this Court holds that Congress presumptive excluded the government from the application of § 201(c)(2).

"Recognized or Established Prerogative Interest or Title"

The recommendation of leniency in exchange for testimony is a recognized and established activity of federal prosecutors in the investigation and prosecution of criminal activity. "No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." *Cervantes-Pacheco,* 826 F.2d at 315. This traditional prosecutorial granting of leniency has, throughout history, been sanctioned by congress and the courts. *See* 18 U.S.C. § 3553(e); 18 U.S.C. §§ 6001-6005; 28 U.S.C. § 994(n); USSG § 5K1.1; Fed.R.Crim.P. 35(b). *See, e.g., United States v. Ford,* 99 U.S. 594, 604 (1878) (holding that a public prosecutor is permitted to induce a witness to fully and fairly testify the guilt of his associates in exchange for the prosecutor's recommendation for executive clemency). The case law is replete with instances of this well-known practice. *See, e.g., United States v. Medina,* 90 F.3d 459, 464 n. 8 (11th Cir. 1996); *United States v. Garcia Abrego,* 141 F.3d 142, 151 (5th Cir. 1998); *United States v. Garcia,* 66 F.3d 851, 857 n. 6 (7th Cir. 1995); *United States v. Benny,* 786 F.2d 1410, 1418 (9th Cir. 1986). In short, the

practice is a recognized and established "prerogative interest or title," and the government is therefore presumptively excluded from the application of § 201(c)(2).

Obvious Absurdity

Applying § 201(c)(2) to federal prosecutors would also work an obvious absurdity in the application of federal statutes. Since its inception, § 201(c)(2) has never been applied to federal prosecutors. The federal sentencing statutes, and the United States sentencing guidelines promulgated as a result of Congressional action, were enacted subsequent to § 201(c)(2), and are in direct conflict with the *Singleton* panel's analysis. It is obvious that Congress intended either to immunize the government from § 201(c)(2), or to supersede the bribery statute as it applies to federal prosecutors. The federal criminal sentencing statue, 18 U.S.C. § 3553(e), provides: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 994(n) of Title 28 instructs the United States Sentencing Commission to ensure that guidelines reflect "the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Similarly, Fed.R.Crim.P. 35(b) provides: "The court, on motion of the Government made within one year after the

imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . " Thus, Congress has sanctioned leniency by federal prosecutors to induce a defendant's "substantial assistance" in another defendant's investigation or prosecution.

These statutes, which authorize the rewarding of substantial assistance after it is rendered, would be in conflict with § 201(c)(2) under the *Singleton* panel's analysis. The *Singleton* panel's attempt to reconcile the statutes by declaring that substantial assistance does not include testimony, *see* 1998 WL 350507, at *16, is no [sic] convincing. This Court, like most throughout the nation, has for the last eight years reduced sentences, upon the motion of the government filed in response to a defendant's testimony. Thus, the application of § 201(c)(2) to the government would not merely result in the exclusion of the testimony of accomplice witnesses, but would also necessitate the bizarre conclusion that federal prosecutors routinely violate the law by promising to move to reduce the sentences of defendants in exchange for their testimony.

Many district judges, including this one, have expressed frustration at minimum mandatory sentences and resulting reductions available to those with little information and thus little testimony to provide. Nevertheless, Congress has maintained its position to reward cooperation and testimony with a reduction in the sentence. Even the Congressional response to some public

objection to the harsh penalties facing first offenders has included a requirement of cooperation.[2]

The federal sentencing statutes explicitly provide for grants of immunity and reduces sentences in exchange for testimony from a witness. USSG § 5K1.1 provides that the government may move for a downward departure from the guidelines if it determines that the defendant has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . The appropriate reduction shall be determined by the court for reasons stated that may include . . . the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." (emphasis added). Thus, this provision expressly allows for the government to reward a defendant for testifying, and the *Singleton* panel's attempt to distinguish "substantial assistance" from testimony therefore fails to reconcile its terms with their radical interpretation of § 201(c)(2).

Applying § 201(c)(2) to federal prosecutors also works an absurdity in view of the federal immunity statute, 18 U.S.C.A. §§ 6001-6005. The *Singleton* panel noted that §§ 6001-6005 "authorize 201(c)(2) criminalizes offering anything of value for testimony," 1998 WL 350507, at * 7, yet the panel failed to harmonize these statutes. A promise by a federal prosecutor to grant immunity is a

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[2] 18 U.S.C. § 3553(f)(5) and U.S.S.G. § 5C1.2(5) require a defendant to disclose all the information he possesses about his involvement in the crime, including the identities and participation of others, before his is eligible for the safety valve provisions allowing for a sentence below the minimum mandatory.

thing of value, since a witness subjectively attaches value to it. See *Singleton*, 1998 WL 350507, at *9. In short, this statute provides further evidence that Congress intended to exclude the government from the application of § 201(c)(2) when granting leniency in exchange for testimony, in order to effectuate an investigation or prosecution.

CONCLUSION

The statutory class "whoever" in the federal bribery statue, § 201(c)(2), was not intended to encompass a federal prosecutor actually engaged in the investigation or prosecution of a crime. The law has always recognized a manifest difference between a private individual offering another individual money in return for testimony in court and a federal prosecutor promising a witness a recommendation to a court for a downward departure in exchange for testimony. The fact that § 201(c)(2) has never been applied to federal prosecutors and that safeguards have been established to curtail abuses of this well-established practice make clear that Congress and the courts have sanctioned this practice as a necessary investigatory and prosecutorial activity, one that, in fact, predates the founding of our nation, *See, e.g., Rex v. Rudd*, 1 Cowp. 331 (1775) (holding that a prosecutor may give hope to an accomplice that if he discloses the whole truth, he may, by a recommendation of mercy, save himself from punishment and secure a pardon). The holding of the *Singleton* panel would dangerously disable the government's investigatory and prosecutorial powers. Surely if Congress had intended to eliminate a procedure so well-

established, it would have done so in clear, unambiguous terms. Accordingly, it is

ADJUDGED that Defendant's motion to exclude is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of August, 1998.

UNITED STATES OF AMERICA,

v.

Marcellus REID, Defendant.

No. Crim.A. 3:98CR64.

United States District Court, E.D. Virginia.

July 28, 1998.

John Kenneth Zwerling, Zwerling & Kemler, P.C., Alexandria, VA, Mark J. Rochon, Rochon, Roberts & Stern, Washington, DC, Lisa Bondareff Kemler, Zwerling & Kemler, Alexandria, VA, for Marcellus Reid, defendant.

David John Novak, Hannah Lauck, United States Attorney's Office, Richmond, VA, for U.S.

MEMORANDUM OPINION

SPENCER, J.

THIS MATTER is before the Court on two motions. The first is a motion by defendant Marcellus Reid to suppress testimony of certain government witnesses under the reasoning of *United States v. Singleton*, No. 97-3178, 1998 WL 35057 (10th Cir. July 1, 1998), reh'g en banc granted, opinion vacated, No. 97-3178 (10th Cir. July 10, 1998). The second is a motion by the defendant to suppress certain evidence. For the reasons stated below, the Court DENIES both motions.

I. Motion to Suppress Testimony of Government Witnesses Pursuant to *Singleton*

Reid moves to suppress the testimony of all witnesses that have received or been promised anything of value for their testimony. His motion is based on the three-judge panel decision in *United States v. Singleton*, where the Court held that any promise made by the government to a witness in exchange for truthful testimony violates the criminal gratuity statute, 18 U.S.C. § 201(c)(2). At the outset, the Court wants to make it clear that the holding in the *Singleton* case is not the law in the Fourth Circuit. In addition, the Court notes that the *Singleton* decision has been vacated by the Tenth Circuit; consequently, there is no place in this country where it is legally binding. However, as the defendant has presented to this Court the issue raised in *Singleton*, that is, whether a U.S. Attorney's promises in exchange for truthful testimony violates the law, the following analysis is necessary.

The criminal gratuity statute at issue in *Singleton* and here states, in relevant part:

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony . . . as a witness upon a trial, hearing, or other proceeding . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2). According to the three-judge panel of the Tenth Circuit, the U.S. Attorney's promises in

its case[1] constituted "things of value" that were "for or because of" the coconspirator's testimony in the *Singleton* trial. To reach its decision, the Tenth Circuit first looked at the "statutory plain language" of Section 201(c)(2), which the Court suggested was broad. 1998 WL 350507 at *3-4. The Court broadly construed "whoever" and held that the class of persons that can violate the statute includes U.S. Attorneys. However, this Court disagrees.

Section 201(c)(2) Does Not Apply to the U.S. Attorney

In *Nardone v. United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L.Ed. 314 (1937), the United States Supreme Court described a canon of statutory construction where a statute does not apply to the government or affect governmental rights unless the text of the statute expressly includes the government. *Id.* at 383. The Supreme Court stated that the canon has been applied in two kinds of situations. "The first is where an act, if not so limited,

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[1] In the plea agreement, the U.S. Attorney promised: (1) not to prosecute the cooperator for any other violations of the Drug Abuse Prevention and Control Act stemming from his activities then under investigation (with the exception of perjury or related offenses); (2) to advise the sentencing court of the nature and extent of the cooperation provided by the coconspirator; and (3) to advise the state parole board of the nature and extent of his cooperation. *Singleton*, 144 F.3d 1343, 1998 WL 350507 at *2. In return, the coconspirator agreed "in consideration of the items listed in paragraph 2 above . . . [to] testify[ ] truthfully in federal and/or state court . . . . " *Id.* at *2.

In the instant case, the United States concedes that the standard plea agreement and cooperation provisions used in the Eastern District of Virginia substantially mirror those at issue in *Singleton*.

would deprive the sovereign of a recognized or established prerogative title or interest." *Id.* at 383. At the same time that the Court described this first exception, the Court noted that "[t]he rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself." *Id.* at 383 (emphasis added). In reviewing this statement by the Supreme Court, this Court notes that the words "less stringently applied" were used, rather than a declaration that the exception never applies to government agents.

The second category described by the *Nardone* Court is "where a reading which would include such [government] officers would work obvious absurdity." *Id.* at 384. In the instant case, the Government argues that applying Section 201 to standard plea agreements in this District (and all others) would "work obvious absurdity" and would run contrary to the criminal justice system which has been in place for decades. This Court finds the Government's arguments persuasive.

There are several legal examples as to how prosecutors have historically been supported by the federal courts in recommending leniency in exchange for testimony. In the *Whiskey Cases*, 99 U.S. 594, 25 L.Ed. 399 (1878), the Supreme Court recognized the practice:

> Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonable expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a

> pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Id. at 604. Since the Supreme Court's recognition in the *Whiskey Cases*, there have been numerous implicit and explicit recognitions of the legitimacy of inducing witnesses to testify by offering them promises of leniency. An example not adequately dealt with in *Singleton* is *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), where a U.S. Attorney failed to disclose to the defense the government's promise to a government witness that he would not be prosecuted if he cooperated. The Supreme Court held that nondisclosure of the promise amounted to a violation of due process. While the Supreme Court did not directly address the issue of whether the promise itself was problematic, the Court did rule that the government must disclose a promise of leniency made to a key witness in exchange for that witness' testimony. The Court's holding implicitly suggests that the promises themselves are permissible.[2]

In any event, there is an endless number of federal cases among the Circuits in favor of plea agreements. In *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985), the Court held that the risk of perjury created by the defendant's alleged accomplices' plea agreements was not so great that defendant's due process rights were violated by the admission of the accomplices' testimony at trial. In

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[2] The *Singleton* Court believed, however, that *Giglio* could not be dispositive on whether the promises are permissible under Section 201(c)(2) because the question was not squarely presented to the Supreme Court.

the words of the Court, "[l]ong ago the courts rejected the notion that the testimony of co-defendants and other interested witnesses was so likely to be unreliable that it should be excluded." *Id.* at 196. In *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974), the Seventh Circuit held that the government has the authority to allow civil immunity in return for testimony and stated that "[i]f the government can excuse criminal or civil liability in settling a criminal case, surely it can use that power of compromise to obtain a guilty plea or to procure testimony in other proceedings. Both are legitimate objectives of plea agreements." *Id.* at 1102. *See also United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983); *Lyda v. United States*, 321 F.2d 788, 794-95 (9th Cir. 1963). If the concern is that plea agreements will taint witness testimony, as it seems to be in *Singleton*, this Court emphasizes that disclosure of the plea agreements to defense before trial, cross-examination of cooperating witnesses, and jury instructions all provide opportunity to ferret out false testimony that an interested witness might give because of a government promise. Also, most defendants who make plea agreements with the Government are made to understand that the agreements are not based on the conviction of anyone, rather they are based on truthful testimony.

With that said, the Court must agree with the Government that the second exception described in *Nardone* applies here. There is a long history of plea agreements of the type in *Singleton* being accepted by federal courts. As the Fifth Circuit has stated, "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and

having that witness testify under a plea bargain that promises him a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). In many cases, as stated by the First Circuit in *Dailey*, the most knowledgeable witnesses available to testify about criminal activity are indicted coconspirators. *See Dailey*, 759 F.2d at 196. In fact, this Court believes that there are situations where those individuals may be the only credible witnesses of criminal activity and, without their testimony, the government would not be able to obtain convictions. It is naive to assume that most coconspirators would be so altruistic as to abandon their own self-interest and testify for the very government that seeks a stiff sentence against them without a bargain being made. To prohibit prosecutors from making promises in exchange for testimony works an "absurd" result where crimes go unresolved because of worries about testimony that may be questionable, even though the system already has built-in safeguards concerning questionable testimony by interested witnesses.[3]

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[3] For this Court to hold otherwise, the Court would have to ignore the intent of other federal statutes addressing immunity and sentencing reductions.

Congress has codified aspects of the long-accepted bargaining practice between prosecutors and cooperating individuals, by passing a number of statutes, including: 28 U.S.C. § 994(n) (directing the Sentencing Commission to ena [sic] guidelines that allow for sentences under the minimum statutory sentence in order to take into account substantial assistance by defendants); 18 U.S.C. § 6003 (authorizing district courts to grant immunity to a witness where the Justice Department concludes a witness is likely to refuse to testify); 18

In short, the right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of the criminal trial. This Court holds that a reading of Section 201(c)(2) that includes government attorneys would work "obvious absurdity" and, thus, this case falls within the canon expressed in *Nardone* that "the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act."[4] Therefore, the motion to suppress testimony is DENIED.

II. Motion to Suppress Evidence

The defendant also moves for an order prohibiting the government from introducing any evidence obtained as a result of the warrantless search of a 1988 Buick Regal, which the defendant claims that he owns. Specifically, the defendant would like to suppress information about the existence of secret compartments in the Buick.

U.S.C. § 3521 (authorizing witness relocation by the Attorney General for a potential witness subject to danger).

[4] Although this argument was not made by the Government, the Court also believes that Section 201(c)(2) does not apply to the U.S. Attorney because the first *Nardone* exception applies. The right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of criminal trial and must accurately be described as a "recognized or established prerogative title or interest" of the sovereign.

The Government relates the following as background. On May 17, 1996, a grand jury sitting in Richmond returned an indictment charging Ronald and Stephen Zebrowksi, Jr. with continuing criminal enterprise (CCE) and related narcotics offenses. After Ronald Zebrowski escaped from the custody of the Hanover County Sheriff's Department, where he had been in state custody at the time of indictment, an international manhunt ensued for the Zebrowski brothers. On July 14, 1996, Deputy United States Marshal Michael Moran learned that that Stephen Zebrowski, Jr. was at a particular Red Roof Inn in West Palm Beach, Florida. He found out that Zebrowski was there with another Zebrowski organization member, Steven C. Jones and that they had rented two rooms. Apparently, they shared the rooms with a number of women and had three vehicles at the hotel, including the 1998 Buick Regal.

Moran subsequently arrested Zebrowski in a room where a woman named Karen Mitchell was present. When Moran interviewed Mitchell, she stated that she had drive [sic] the Buick Regal to Florida from Maryland and that the car belonged to Zebrowski. Zebrowski, who had denied that he was Stephen Zebrowski, Jr., claimed that his name was Brandon Murray and denied any connection to the car. When Moran asked Mitchell if he could search the car, she said yes, told him where the keys were, and gave him permission to use them. At that time, the hotel employees were also telling Moran that the cars had to be removed. Moran impounded the car and later conducted what the Government calls an inventory search of the car. After a drug-detecting dog checked the car and alerted to the presence of drugs, Moran looked

for and found a secret compartment in the car.[5] However, he did not find any drugs in the car.

Ultimately Stephen Zebrowski, Jr. pled guilty to CCE and, as part of his plea agreement, consented to the forfeiture of the Buick Regal. On September 30, 1996, the Court entered an Order of Forfeiture. The defendant in the instant case (Reid) began an "innocent owner' claim of the car but withdrew his claim when he was informed that he had to give a deposition under oath. Still, the defendant claims that the car was registered to him and that this confers standing on him to now seek suppression of evidence obtained from the car.

The burden rests upon the defendant to establish standing prior to litigation of the suppression motion. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 65 L.Ed.2d 633 (1980). "[O]wnership of the item seized is, by itself, insufficient to confer a privacy interest in the area searched. At most, an interest in the items found may be a factor considered when deciding whether there is a privacy interest in the area searched." *United States v. Manbeck*, 744 F.2d 360, 374 (4th Cir. 1984). In addition, the Fourth Circuit has recognized that a defendant may lack standing to challenge the search of property that he abandons. *See United States v. McDonald*, 61 F.3d 248, 255 (4th Cir. 1995) (defendant lacked standing to challenge search of car that was abandoned off public highway).

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[5] Moran knew Zebrowski was a large-scale drug trafficker that routinely used secret compartments to transport drugs from Florida. (See Govt. Opp. Mot. Suppress Evid, 3:96CR41 Indictment Attached, page 6, para. 6.)

The Government argues that the defendant abandoned his interest in the Buick when he gave it to Zebrowski to use in transporting drugs. The Government also points to the fact that the Buick was discovered by Moran in Florida, nearly 1500 miles away from Reid, and that the only person claimed by the individuals in the motel rooms to have ownership of it, Zebrowski, was denying any claim to the car. Indeed the Court has substantial question as to whether the defendant has standing simply because the car is registered to him, for he was in Maryland at the time the operative events occurred in Florida. In addition, one could make the argument that he abandoned the car.

Even assuming standing, however, the Court believes that consent from Mitchell was sufficient to make the search of the car valid. "When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[6] *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). This Court concludes that it was reasonable for Moran to believe that Mitchell had the authority to consent. After all, Mitchell was the only one claiming any

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[6] "Common authority" rests on "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.*

connection to the car when the hotel needed it to be moved. Even if Moran was wrong in believing she had authority, the U.S. Supreme Court and the Fourth Circuit have ruled in other cases that suppression is not necessary where the police officer's belief that a third party had authority to consent was reasonable. *See Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Kinney*, 953 F.2d 863, 866-67 (4th Cir. 1992).

Since there is no temporal limitation on Mitchell's consent to search the car, her consent was valid until revoked. This means that Moran could have searched the car from tire to steering wheel two days after the consent was given. Consequently, the search at issue was valid. The motion to suppress is DENIED.

An appropriate Order shall issue